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NO. 276

IN THE

Supreme Court of the United States

October Term, 1961

EMMETT GRAY, *Petitioner*

VERSUS

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE CO., MERRITT-CHAPMAN & SCOTT CORP., AND PELICAN ISLAND DEVELOPMENT CORP.,
Respondents

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

Emmett Gray, respondent, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the interlocutory decree of the United States District Court for the Southern District of Texas in favor of the libellants Edwin E. Johansson, Kansas City Bridge Co., Merritt-Chapman & Scott Corp., and Pelican Island Development Corp., and remanding the cause for proof of damages.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 287 F. 2d 852 and appears *infra Appendix*, p. 33, *et seq.* The opinion is reported also at 1961 A.M.C. 703, but inaccurately in its original version, which was later corrected by order of the Court of March 27, 1961. The unreported opinion of the United States District Court, its Findings of Fact and Conclusions of Law, is printed *infra* Appendix, p. 39, *et seq.*, and at R. 874-887.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 15, 1961, and copy thereof is printed *infra* Appendix, p. 51. Thereafter petitioner presented to the Court of Appeals petition for rehearing, which was denied without further opinion on May 3, 1961.

Jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C., Sec. 1254 (1).

THE QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions:

I.

Whether the "pilotage clause" generally agreed upon between ships and their towing tugs in American harbor movements is lawful, particularly under these circumstances:

An ocean-going vessel with her master in command upon her bridge and with a full crew at their stations but without motive power, was being shifted by tugs within the confines of Galveston harbor. A licensed pilot, but an

employee of the company which was the charterer and operator of the tugs, was on the bridge as "dead-ship" pilot. On the advice of this pilot, the master ordered the ship's crew to drop the vessel's anchor, clearly an act of pilotage or vessel management and not of towage. The anchor struck a submerged pipe line. The tugs were in no way involved and were absolved from any liability.

The contract between the vessel's operator and the tug owner contained no words attempting to relieve the tugs or those connected with them for responsibility for negligent *towage*, but it did provide that any pilot upon a towed vessel was the servant of the vessel, and that neither the tugs nor their owners or agents or charterers would be liable for any acts of the pilot.

Did your Honors hold in *Bisso v. Inland Waterways Corporation*, 1955, 349 U. S. 85, that such a *pilotage* clause was invalid, as the Courts below have held, or is such a *pilotage* clause valid particularly where the negligence claimed is an act of *pilotage*, as your Honors have held in *Sun Oil Company v. Dalzell Towing Co.*, 287 U. S. 291, and in *United States v. Chris Nielson*, 349 U. S. 129, decided on the same day as *Bisso*, and as has also since been held in *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209, and in all other decisions where a *pilotage* clause similar to the one in the contract here was at issue?

II.

In the belief that prominent signs marked the location of submerged pipe lines in a harbor, a vessel drops her anchor. The pilot does not actually know the exact location of the pipe lines, and the anchor strikes one of the two

pipe lines. The sign at one end of the pipe lines is placed some thirty-one feet away from the lines and the sign at the other end is placed some one hundred fifteen feet away, and had the lines lain between the signs neither would have been so struck by the anchor. Is the duty of the pilot (and the ship) to know where navigational obstructions are located *absolute*, so that where he does not have actual knowledge of their location obtained by taking soundings or otherwise he is wholly at fault, as the Court below has held, or is he held instead to a high standard of ordinary care, as your Honors have held in *Atlee v. Packet Company*, 21 Wall. 389, so that the pipe line owner is not absolved from its fault in failing to mark where the pipe line lays in the navigable waters as held in *The Georgie*, 9 Cir., 14 F. 2d 98, *The Steam Dredge No. 6*, 2 Cir., 241 F. 69, and recently in *Essex County Electric Co. v. M/S Godafoss*, D.C. Mass., 1955, 129 F. Supp. 657?

III.

An ocean-going vessel in command of her master and with a full crew aboard and at their stations is being shifted by tugs in a harbor. The vessel's engines are being worked upon and not in use. Upon the bridge with the vessel's master is a licensed pilot, an employee of the company operating the tugs and designated by it to act as a "dead-ship" pilot. On the advice of this pilot but as his own independent order, the master has the crew drop the vessel's anchor, which strikes a submerged pipe line. Both the pilot and the master rely upon pipe line warning signs in the dropping of the anchor.

The vessel being held liable *in rem*, is it entitled to recover by way of indemnity from the pilot, as the Court below has held, or is the vessel (through her master) a

joint tort-feasor with the pilot and not entitled to contribution (and hence indemnity) from the other tort-feasor, as your Honors have held is the applicable rule in admiralty as well as at common law in *Halcyon Lines v. Haenn Ship Co.*, 342 U. S. 282?

STATEMENT

This is a suit for damages to one of the two submerged pipe lines caused by its being struck by an anchor dropped from a vessel being turned to enter a slip of the Port of Galveston, Texas. The slip was known as Slip "A."

The suit was in admiralty, and jurisdiction in the District Court for the Southern District of Texas lay under the Act of June 25, 1948, c. 646, 62 Stat. 931, Title 28, U. S. Code, Sec. 1333(1), amended Act of May 24, 1949, c. 139, Sec. 79, 63 Stat. 101, and Act of June 19, 1948, c. 526, 62 Stat. 496, Title 46, U. S. Code, Sec. 740.

Suit for damages in excess of $280,000 was brought by libellants as those at interest upon the pipe line against the M/V HAR CANAAN, from which the anchor was dropped, and her operator, and against the assisting tugs and their owning and operating companies, and by later amendment against the pilot of the M/V HAR CANAAN, petitioner Emmett Gray. Cross-pleadings were filed.

The evidence was largely without dispute, and with the exception of the facts surrounding the issuance of the order to drop the anchor, is with reasonable accuracy though it is respectfully submitted too briefly summarized by the District Court in its Findings of Fact, printed below at Appendix, p. 40.

Briefly, these are the controlling facts:

Pursuant to a permit issued by the United States Corps of Engineers, on January 27 and 28, 1958, libellants laid

two pipe lines in a dredged trench on the bottom of Galveston harbor. On the Galveston Island end, the lines came out of the water about eighteen feet from the eastern side of Slip "A." From this point at the entrance to Slip "A" the pipe lines ran almost at a right angle to the center line of the channel directly across Galveston harbor to a point opposite Slip "A" on Pelican Island.

The last of three Notices to Mariners relative to the pipe lines was issued on January 16, 1958, and it notified navigation interests of the location of the pipe lines, stating that the lines would run between Pier 41 (which is immediately adjacent to and to the east of Slip "A") and Pelican Island, and that "the location of the pipe lines is marked by warning signs on Pier 41 and on Pelican Island."

Instead of the location being so marked, the sign on Pier 41 was in fact placed at its nearest point to them some thirty-one feet east of the end of the pipe lines, and the sign on the Pelican Island side across the harbor was placed on a platform in the water east some one hundred fifteen feet from the pipe lines.

The two pipe lines were laid on January 27 and 28, and at no time between the time of their laying and the time of the casualty on March 21 were the pipe lines ever found to be farther apart than ten feet and actually were crossed and had to be pulled apart on March 3, R. 596, 599, and were pulled farther apart also on March 16 near their Galveston Island end when found there to be only one and one-half feet apart. R. 601-603.

The anchor struck the westernmost of the two pipe lines. Since there was no evidence that the other line was touched by the anchor, and since this line as stated lay no more and probably less than ten feet from the one struck by the

anchor, it is manifest that had the pipe lines lain between the warning signs neither would ~~not~~ have been struck.

On the morning of March 21, the M/V HAR CANAAN was performing routine maintenance work upon her engines and had no motive or rudder power, but in order that her loading could continue it was desired to shift her from the berth where she then lay about two miles through Galveston harbor waters to another berth in Slip "A." Her agent notified the tug company, that the vessel was to be shifted "dead-ship," by the course of dealing it being understood that she had no motive power and that tugs and a pilot were to be sent to her. Petitioner Emmett Gray was sent to act as pilot along with three tugs for power.

When he went aboard the vessel Captain Gray explained to the master that it would be necessary to drop the ship's anchor to assist in turning the vessel when Slip "A" was reached, and the master approved this planned maneuver, giving orders to his crew to have the anchor ready.

The vessel was then moved by the tugs through the harbor to Slip "A." During the entire time of this shifting, the tugs were directed by the pilot Captain Gray, but the master was in command and ~~had~~ with him on the bridge was the third officer, her full crew was aboard the vessel, and the vessel's chief officer with the required number of seamen were manning their deck stations.

When the vessel was near Slip "A," the pilot told the master the anchor should be dropped. The master testified that he then checked the prominent signs warning of the pipe line crossing and only after making sure the anchor would drop well clear of any lines did he permit the ship's third officer to transmit the order to the chief officer and crew forward, who dropped the anchor. R. 681-683.

Captain Gray testified that he knew generally that pipe lines were being laid across the harbor between Pier 41

and Pelican Island but had not actually sighted them nor while they were being worked on had before this time piloted a ship in their vicinity nor had read the Notices to Mariners dealing with them. In giving the order or advice to the master to drop the anchor he relied on the warning signs as to the location of the lines. (Captain Gray's recollection was that the master gave the order to drop the anchor before Gray pointed out the signs to him; the master testified positively, however, that he asked Gray about the signs and himself checked them to be sure the anchor would fall clear before giving the order to his crew to drop the anchor. R. 681-683.)

There was no evidence that the three tugs furnishing the motive power for the movement of the vessel were in any way at fault.

For sometime prior to the day of the casualty, those tugs which assisted in the movement of ocean-going vessels within the harbors of Galveston and some other Texas ports, i.e., which were used in the harbor towing of deep-sea vessels such as the M/V HAR CANAAN, were owned by three separate towing companies. One of these was Bay-Houston Towing Company, whom the operator of the M/V HAR CANAAN by signed contract engaged to provide all the tugboat power it required.

These three owning companies made all agreements with ship operators requesting the services of towboats, but did not actually operate the tugs. The tugs were chartered bareboat to an operating company, G. & H. Towing Company, that manned and operated them, so as regardless of ownership to utilize the tugs most efficiently in assisting vessels needing tugboat power.

Only at Galveston, where the state-licensed bar pilots before the time of this casualty did not offer pilotage ser-

vices for such ships, did the three towing companies offer to furnish pilotage for ships without motive power. But these owning companies did not themselves employ any pilot to perform such services: they requested G. & H. Towing Company to furnish a pilot to perform their contracts.

To act as such pilot for a ship without motive power, G. & H. Towing Company designated its port captain, petitioner Emmett Gray. Captain Gray was licensed by the United States Government to act as pilot for the waters of Galveston harbor, but he held no license as a bar pilot from the State of Texas and was not a member of the Galveston Pilots Association.

While, as stated, the operation of the tugs was done only by G. & H. Towing Company, their charterer, the three owning companies maintained separate soliciting offices and were actively competitive with each other, for they and not G. & H. Towing Company made the contracts with steamship operators for tug services and billed for the services, and only the company having such contract received thirty-five per cent of the amounts paid. Even if it owned the tug which performed the service unless it had the contract with the steamship operator the owning company received none of the revenue derived from that particular towing job. In each instance the charterer, G. & H. Towing Company, received sixty-five per cent of the revenues earned, being paid by the contracting owning company and not by the steamship operator. R. 784-785.

Where in Galveston harbor pilotage services were furnished a ship without motive power, the contracting towing company kept thirty-five per cent of the charge made the ship, paid G. & H. Towing Company sixty-five per cent, and out of its sixty-five per cent G. & H. Towing Company paid Captain Gray $20.00. R. 787.

There is not an iota of evidence that to secure tug services in Galveston or elsewhere steamship operators were in any way required to sign any agreement with any of the towing companies as a condition of receiving the services of tugs, but if a steamship operator did sign an agreement by whch it agreed to obtain all of the tug services it needed only from the one owning company with which it contracted, it obtained the tug services at a ten per cent discount off the tariff rates. Appendix IV, p. 52.

The charterer of the M/V HAR CANAAN, Maritime Overseas Corporation, had before the casualty signed such an exclusive contract with Bay-Houston Towing Company, and it received the ten per cent discount for the tug hire and the pilotage furnished the vessel on the day in question, paying the sums due to Bay-Houston Towing Company. R. 727-729.

There were no material differences between the contracts offered steamship operators. Each contained a provision allowing the use of tugs other than those owned by the contracting towing company like this:

> "Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs."

And each contained a "pilotage clause," as follows:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of

> all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and nine of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

Each contract also contained as part of the tariff for Galveston-Texas City the provision:

> "Pilotage-Shifting Vessels Without Own Power. . . $60.00."

Nowhere in the tariffs, nor in the contract signed by Maritime Overseas Corporation with Bay-Houston Towing Company covering the movement of the M/V HAR CANAAN on the day of the casualty, is there any language which could conceivably be read to mean that the towing companies contracted to move vessels from one location to another. The company offered and agreed *only* to provide *tugboat power*, and the rates charged were only *for each tug furnished*, though these rates of course varied with the distance the tug assisted the vessel. Appendix V, p. 55.

The Trial Court found that petitioner Gray was negligent in giving the order to drop the anchor, which fell on the pipe line, the "presence" of which he should have known from other sources and from the prominent warning signs but as to the location of which he was not misled by the position of the warning signs. The master of the M/V HAR CANAAN was found not at fault because

"the pilot's lack of knowledge was not manifest so as to warrant intervention by the Master." Petitioner was held liable personally for his negligence, and G. & H. Towing Company liable because he was its employee, and the M/V HAR CANAAN liable *in rem* for the negligence of petitioner "as her pilot." The vessel was allowed indemnity from both petitioner and G. & H. Towing Company.

The towing tugs and their owners were found not liable.

The exculpatory provisions of the pilotage clause of the contract with the vessel's operator were held to be void, reliance being placed upon *Bisso v. Inland Waterways Corporation*, 349 U. S. 85, on the ground that the monopolistic situation in Galveston harbor gave no freedom of choice to vessels in the type of towing contract offered and to secure tugs vessels had to agree to such exculpatory provisions. *Sun Oil Company v. Dalzell Towing Co., Inc.*, 287 U. S. 291, was distinguished.

The Court of Appeals affirmed, petitioner Gray's negligence being found to be a failure to use due care "to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines he dropped the anchor on them." No mention is made of the master of the M/V HAR CANAAN.

After thus imposing upon petitioner Gray an absolute duty to know the exact location of the pipe lines, the Court below agreed the pilotage clause was invalid under the *Bisso* decision and distinguished the case of *Sun Oil Company v. Dalzell Towing Company* as one dealing "with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots" and stated petitioner was not such a pilot, the case really being merely one where G. & H. Towing Company

furnished a towing service to a dead ship and its port captain conducted it. The liabilities of the M/V HAR CANAAN and of Maritime Overseas Corporation were then affirmed *under the law governing pilotage*. (The Court of Appeals by its order of March 27, 1961, corrected its statement that Maritime Overseas Corporation had been found liable *in personam*.)

REASONS FOR GRANTING THE WRIT

Your Honors should grant writ of certiorari in this cause for the following reasons:

(1) To correct the manifest error of the Court of Appeals in refusing to follow the settled law that an exculpatory pilotage clause such as that in the contract here is valid and not contrary to public policy and unenforceable, there being not a single other American decision so holding, and your Honors having expressly upheld as valid such a clause in *Sun Oil Company v. Dalzell Towing Co.*, 287 U.S.291, and having as recently as 1955 affirmed the validity of such a clause in *United States v. Chris Nielson*, 349 U.S 129, decided the same day as *Bisso v. Inland Waterways Corporation*, 349 U.S. 85. We respectfully submit that the Court is in plain error in holding applicable to this case of *pilotage* the decision in *Bisso v. Inland Waterways Corporation*, which only held invalid a broad *towage* freedom-from-liability clause, and in declaring the *Sun Oil Company v. Dalzell Towing Co.*, case inapplicable as one of "publicly licensed involuntary or compulsory pilots," that *Dalzell* case being clearly one where no compulsory pilot was at all involved and being instead one where the captain of one of the assisting tugs directed the ship maneuver. We further earnestly submit the decision below is in direct

conflict with the recent decisions in *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209, and with all other decisions where the pilotage clause has been directly at issue. Since a similar pilotage exculpatory clause is, as far as petitioner can tell from the decisions, at use in every American port, this decision if left unreversed would tend to upset an important segment of American maritime law and contracts under which most ocean-going vessels are moved in American harbors.

(2) To correct the error of the Court of Appeals in imposing an absolute duty upon a pilot to know the exact location of obstructions to be avoided in the navigation of a vessel and in thus absolving persons obstructing navigable waters from the duty to give warning to those using such waters of the location of such obstructions, this decision being in conflict with the decision of this court in *Atlee v. Packet Company*, 21 Wall. 389, holding that pilots are not absolutely liable but are required only to exercise due care, and also in conflict with the settled law as set forth in the decisions of *The Georgie*, 9 Cir., 14 F. 2d 98, and *The Steam Dredge No. 6*, 2 Cir., 241 F. 69, that in navigable waters the right of navigation is paramount and that persons obstructing them are liable for failure to mark properly such obstructions.

(3) To correct the error of the Court of Appeals in requiring a voluntarily engaged pilot to indemnify the vessel from its *in rem liability*, where the master of the vessel actively participated in the negligent act for which the pilot and the vessel are held liable, the decision being directly contrary to the settled law as set forth in the

decisions of this Court in *Ralli v. Troop*, 157 U.S. 386, and *The Oregon*, 158 U.S. 186, that the presence of a pilot does not relieve the master of his responsibility for the proper navigation of his vessel, and contrary to the correct rule so recognized by the Court of Appeals below itself in *Charente Steamship Co. v. United States*, 5 Cir., 1926, 12 F. 2d 412; requiring the pilot to indemnify the vessel thus being contrary to the decision of your Honors in *Halcyon Lines v. Haenn Ship Co.*, 342 U.S. 282, that there is no right of contribution (and hence indemnity) between joint tort-feasors in admiralty just as at common law.

ARGUMENT

I.

With all respect, petitioner respectfully submits that the Court below has confused the decisions which hold invalid clauses exempting companies and tugs from liability for *negligent towage* with the decisions which uphold the validity of exemptions from liability for acts of *pilotage*. We submit that this is abundantly clear from a careful reading of *Bisso v. Inland Waterways Corporation*, striking down *towage* exemptions and carefully affirming the correctness of decision of *Sun Oil Company v. Dalzell Towing Co.*, where the exemption is a *pilotage* exemption as here, and a careful reading of *United States v. Chris Neilson*, which also affirms the validity of *pilotage* exemptions and states *Bisso* voids only *towage* exemptions.

The consequences of this mis-reading of those decisions are that petitioner, acting as pilot for the M/V HAR CANAAN, and paid for such services $20.00, is denied the protection of the pilotage exemption to which the Court of Appeals acknowledges he would be entitled

since it provides "in effect that neither Gray nor the Towing Company, his employer, would be liable for the negligence of Gray, his employee, indeed its port captain." Petitioner is therefore held liable for damages stated to be in excess of $280,000.00, and instead of being allowed indemnity from the vessel operator as he would be had the case been correctly decided, is held to indemnify the vessel!

Petitioner respectfully submits that this decision is contrary to the settled American maritime law governing in circumstances such as these.

The Contract Afforded Exemption for Pilotage Faults, Not for Towage Faults

The contract between Bay-Houston Towing Company and Maritime Overseas Corporation, operator of the M/V HAR CANAAN, is reproduced at Appendix V, p. 55, below.

A mere reading of the contract reveals that there is *no mention made of any exemption* of the tugs, their operators, or their owners *for any faults in performing towage services.* There is not one word in the contract to that effect.

On the other hand, the contract in several places expressly says that the company only agrees to furnish *tug power*, and expressly provides against liability for the acts of "any pilot" on board an assisted vessel. This clause reads:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or

> otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

It will have been noted that the Court of Appeals has by implication held that had this clause been valid, it would have protected petitioner Gray.

There can be no doubt that petitioner comes within the language of the clause. Petitioner Gray was in the regular employment of G. & H. Towing Company, the charterer of the tugs which assisted in the shifting of the M/V HAR CANAAN, not as a tugboat pilot but as its port captain. He was a licensed pilot. Bay-Houston Towing Company agreed by the contract with Maritime Overseas Corporation to furnish pilotage for shifting the M/V HAR CANAAN on the occasion in question, but Bay-Houston Towing Company secured G. & H. Towing Company to furnish the chartered tugs to fulfill its contract as it had a right to do under that contract. G. & H. Towing Company likewise supplied petitioner to act as pilot. Of course petitioner therefore was the agent of Bay-Houston Towing Company, "borrowed" from his general employer G. & H. Towing Company, and was expressly within the terms of the pilotage exemption clause.

Dropping the Anchor Was an Act of Pilotage

It is certainly clear that dropping the ship's anchor cannot rightfully be deemed an act of towage. It was clearly

an act in the navigation and management of the vessel, accomplished by the ship's crew on the command of the ship's master and at the suggestion, advice, or order of the ship's pilot on the bridge.

The towing tugs obviously had nothing to do with the dropping of the anchor, as is clearly demonstrated by the fact that the District Court dismissed the libel as to them and their owners and absolved them from liability.

Decided cases likewise hold that the dropping of a ship's anchor is an act in the management of a vessel. Please see *The Etona*, S.D. N.Y., 64 F. 880, affirmed 2 Cir., 71 F. 895, and *Luria Bros. & Co., Inc. v. Eastern Transp. Co.*, 2 Cir., 1937, 89 F. 2d 900, both Harter Act cases.

And finally, petitioner Gray has been held by both Courts below to the high standard of care required of pilots, he was sent aboard the vessel as pilot and acted under his government license of pilot, and the District Court held him as pilot and held the vessel *in rem* "for the negligence of Captain Gray as pilot." The contract of course called him a pilot.

Pilotage Exemption Clauses Are Valid

Petitioner believes that there have been no previously decided cases in which the applicability of a like pilotage clause has been directly at issue that have held such a clause invalid. The decided cases have so uniformly upheld the validity of such clauses that Mr. Justice Frankfurter in his dissenting opinion in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, at 98, *et seq.*, was able to assert on a review of the authorities that *all* exemption clauses in towing contracts had theretofore been found to be valid.

The decision in *Bisso v. Inland Waterways Corporation*,

at page 92, clearly holds pilotage exculpatory clauses valid, citing *Sun Oil Company v. Dalzell Towing Co.*, in the following language:

> "It is contended that the towage contract rule we have accepted was rejected by this Court in Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291, 53 S. Ct. 135, 77 L. Ed. 311. We disagree. Unlike the Steamer Syracuse, The Wash Gray and the instant case, Sun Oil did not involve a contract designed to relieve a towboat owner from liability for negligent towage. The contractual clause there involved related only to pilotage. The clause provided that a tug captain who piloted a vessel propelled on its own power should be considered the servant of that vessel and that the tug owners should not be liable for his negligent pilotage. Sun Oil construed this contract as relieving the tugboat owners from all liability for negligence of the tug captain while piloting Sun Oil's vessel and held the contract valid as thus construed. But both the Court of Appeals and this Court recognized that holding the pilotage contract valid did not conflict with The Steamer Syracuse or The Wash Gray. Indeed, this Court expressly stated that the Sun Oil decree was 'not in conflict with the decisions' in The Steamer Syracuse and The Wash Gray. It is of course possible that the Court found an absence of conflict in the cases because of a different construction given the different contracts involved. We doubt this, but however this may be there are more basic differences upon which we prefer to rest this Court's statement that Sun Oil did not conflict with the two prior cases.
>
> "There are distinctions between a pilotage and a towage exemption clause which make it entirely reasonable to hold one valid and the other invalid. A pilotage clause exempts for the negligence of pilots

only; a towage clause exempts from all negligence of all towage employees. Pilots hold a unique position in the maritime world and have been regulated extensively both by the States and Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person can tell them how to perform their pilotage duties. When the law does not prescribe their duties, pilots are usually free to act on their own best judgment while engaged in piloting a vessel. Because of these differences between pilots and towage employees generally, contracts stipulating against a pilot's negligence cannot be likened to contracts stipulating against towers' negligence. It is one thing to permit a company to exempt itself from liability for the negligence of a licensed pilot navigating another company's vessel on that vessel's own power. That was the Sun Oil case. It is quite a different thing, however to permit a towing company to exempt itself by contract from all liability for its own employees' negligent towage of a vessel. Thus, holding the pilotage contract valid in the Sun Oil case in no way conflicts with the rule against permitting towers by contract wholly to escape liability for their own negligent towing."

Petitioner respectfully submits that your Honors affirmed this validity on the same day in the following portion of your decision in *United States v. Chris Neilson*, 349 U.S. 129, 130:

" . . . We granted certiorari to consider the meaning and validity of the pilotage clause, 348 U.S. 811, 75 S. Ct. 59, and at the same time granted certiorari in two other cases, today decided, which involve validity of contracts exempting towers from liability for negligent towage. Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S. Ct. 629; Boston Metals Co. v. The Winding Gulf, 349 U.S. 122, 75 S. Ct. 649.

"(Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291, 53 S. Ct. 135, 77 L. Ed. 311, involved the meaning and validity of a pilotage contract substantially the same as the one here. One of Dalzell's tug captains negligently piloted Sun Oil's vessel causing the boat to ground and suffer damages. Sun Oil sued Dalzell. The contract exempting Dalzell from liability for pilotage was pleaded as a defense. This Court held that the tug company could validly contract against being 'liable for any damage' caused by the negligence of one of its captains in piloting Sun Oil's vessel and construed the contract there as having that effect. . . ."

That petitioner's reading of these decisions is correct is further established, it is respectfully submitted, by the decisions in *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209.

Petitioner therefore respectfully submits that the Court below is clearly in error in its interpretation of *Bisso v. Inland Waterways Corporation*, *Sun Oil Company v. Dalzell Towing Co.*, and *United States v. Chris Neilson*, and that its decision is clearly in conflict with the two last cited cases decided by the Courts of Appeal for the Ninth and Second Circuits.

No Circumstances Here Justify Denying Validity to the Pilotage Clause

The trial Court found that public policy required the pilotage clause to be denied validity because under the monopolistic situation prevailing in the port of Galveston a vessel had no freedom of choice in the type of towing contract offered and must accept a contract with the exculpatory provisions to secure tug assistance.

While it is not admitted that where as here three separate owning companies charter their tugs to an operating company to secure efficient service there is any monopolistic situation, nevertheless the Court is in plain error in stating that a vessel had to agree to a contract with the exculpatory clause to secure tug assistance.

There is absolutely no evidence that vessels were under any requirement to sign the contract, as the operator of the M/V HAR CANAAN did here, in order to obtain tug assistance. As an examination of the contract shows, the inducement to sign it and agree to the contract is the ten per cent discount afforded those signing the contract. This was so testified to. R. 803. And please see Appendix IV, p. 52, and particularly the closing sentence of the offer, "All charges are net, *except when services are performed under contract*, then a discount of 10% is to apply on all tariff rates."

This clearly shows ships could secure tugs without having to sign the contract, and there is as stated no evidence to the contrary.

Further, none of the cases, which uniformly uphold the validity of pilotage clause exemptions, and which are from the great breadth of decisions found in harbor towing contracts in similar terms in practically all American ports,

have ever intimated that because towing services are not furnished by numerous companies the pilotage exemption is invalid. And in the exemption clause employed in the greatest American port, New York, the exemption is accorded from acts of the captains off the tugs, a much broader exemption than the one here of a licensed pilot, even though an employee of the towing company actually furnishing the tugs.

Nor does reason support this view why such a clause should be held invalid. Pilots are licensed by governmental authority and exercise independent judgment and are not subject to supervision and control, except on occasion by the master of the vessel. And why should an assisting tug be obligated to assume the ship's responsibility for the acts of the pilot? The ship is a common carrier, the towing tug not. If the towing tug diligently performs its towing duties, why should it be burdened with an added responsibility for the pilot?

The Court of Appeals did not base its decision holding the clause invalid upon the ground stated by the District Court, but instead preferred to affirm on the ground that petitioner was in fact not a pilot but simply one in charge of a dead-ship towing operation.

(Of course, its characterization of the *Dalzell* case as one of true pilotage by publicly licensed compulsory or involuntary pilots is manifest error; in that case the piloting was done by a captain from one of the assisting tugs, and the exculpatory clause was one stating a captain off a tug became an employee of the vessel being assisted.)

Since the exculpatory clause generally used in New York, and held valid in *Sun Oil Company v. Dalzell Towing Co.*, deals with a tug captain and not a pilot, as do many such

clauses held valid, the reason given by the Court of Appeals is without support in the adjudicated cases.

Its description of the facts here is in error also, it is submitted with all respect: the *contract*, which cannot rightfully be ignored as the Court apparently does, nowhere provides that a complete towing service was to be provided the ship. The contract provided only for tug power, which was furnished, and entirely independently had a clause agreeing in Galveston harbor to provide a pilot on request where the vessel was to be shifted without motive power.

And of course, finally, the acts of negligence charged in this case were acts of *pilotage*, not towage, and the *Bisso* case reference is in error also.

Petitioner respectfully submits, therefore, that the Court of Appeals is in clear error in denying the validity of the pilotage clause under the circumstances of this case, and that he is by such clause in accordance with the settled law enforced in *Moran Towing & Transp. Co. v. Nav. Lib. Triestina*, 2 Cir., 1937, 92 F. 2d 37, 1937 A.M.C. 981, cert. den. 302 U.S. 744, and *Pennsylvania Railroad v. The Beatrice*, 2 Cir., 1960, 275 F. 2d 209, and *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, entitled to be indemnified by the M/V HAR CANAAN and its operator Maritime Overseas Corporation from any liability to respondents the pipe line owners.

II.

It is not in dispute and the District Court has expressly found that the prominent signs which were placed on Pier 41 and across the harbor purporting to mark the location of the lines with the words "Warning Pipe Crossing Do

Not Drop Anchor" were actually thirty-one feet east of the two pipe lines at the Pier 41 end and one hundred fifteen feet east across the harbor on the Pelican Island end of the lines. The true location of the lines was therefore not marked by the signs, and the signs provided misleading information.

Since the vessel approaching from the east dropped her anchor on the westernmost of the two pipe lines, and there was no evidence that the easternmost line (which had never been previously found at any time to be more than ten feet from the western line) was touched or damaged by the anchor, it obviously follows without room for a contrary contention that had the lines actually lain between the warning signs neither would have been struck by the anchor.

Petitioner Gray testified that he knew from general knowledge that pipe lines were being worked on near Pier 41 but had not piloted vessels near there before this occasion and that he told the master when to drop the anchor in reliance upon the prominent signs warning of the position of the pipe lines.

The master of the M/V HAR CANAAN testified that after being told by petitioner to drop the anchor he asked petitioner Gray whether "we are clear of the signs" and on receiving an affirmative reply did not order the ship's crew to drop the anchor until he had himself checked the warning signs to make sure the anchor would fall clear. R. 681-683.

Somewhat contradictorily the District Court held that Captain Gray should have been aware of the "presence" of the lines from the prominent warning signs but was not misled by the position of the warning signs.

The Court of Appeals held that while the District Court could have held the pipe line owners at fault for not marking more precisely the position of the lines, it was not clearly erroneous not to have done so. It then held it was proper to hold Gray at fault (and thus solely at fault) for failure "to use due care to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines" he dropped the anchor on them.

Petitioner respectfully submits the standard of care thus imposed by the Court of Appeals is to make of him as pilot an insurer. He is not being held to ordinary care in attempting to learn of or to know the location of the pipe lines. His duty as held by the Court of Appeals is absolute: at his peril he must ascertain the *precise* location of the pipe lines, by taking soundings or by using other "adequate precautions."

There can be no doubt that since the decision of this Court in *Atlee v. Packet Company*, 21 Wall. 389, the standard of care imposed upon a pilot requiring him to acquaint himself with navigational objects or obstructions is a high one. But petitioner respectfully submits that a pilot is not an insurer and has never been held one, so that his lack of knowledge would absolve another from the effects of its own negligence, and that the decisions of the Courts below impose such a duty upon him without justification in law.

The trial Court has found on undisputed evidence that the warning signs did not show the location of the struck pipe lines. The undisputed evidence establishes that not only the petitioner (contrary to the trial Court's conclusion) but also the master of the vessel in dropping the

anchor relied upon the warning signs as marking the location of the lines.

In absolving the pipe line owners from fault by imposing the absolute duty of knowledge on petitioner the decision of the Court below is clearly in conflict with the decisions of other Courts of Appeal in *The Georgic*, 9 Cir., 14 F. 2d 98, and *The Steam Dredge No. 6*, 2 Cir., 241 F. 69, cert. den. sub. nom., *Standard Gas Light Co. v. Packard Co.*, 244 U.S. 659, in both of which cases the vessels were held not liable even for half damages, and contrary also to a carefully considered recent decision of the District Court of Massachusetts, *Essex County Electric Co. v. M/V Godafoss*, D.C. Mass., 1955, 129 F. Supp. 657, in which the pilot's lack of knowledge of the location of the cable in navigable waters was held not to insulate the other party from its duty to mark properly the obstruction, both parties being held at fault.

III.

Petitioner further urges with all respect that the Court of Appeals is in clear error also in affirming (without discussion) the trial Court's holding that he indemnify the vessel from its *in rem* liability.

The vessel, though without motive power, had a full crew aboard and during the entire time of the operation was in command of her master. The master approved in advance before the ship left the dock the use of the anchor, and when petitioner Gray told the master it was time to drop the anchor, the master did not order the anchor dropped until he had himself checked the position of the ship vis-a-vis the warning signs and only after having done so told the third officer to transmit to the chief officer and

crew at the anchor the order to drop the anchor. R. 681-683. Nor did petitioner represent to the master that he had any other knowledge of the location of the pipe lines than what was available also to the master: he did nothing more than point out the signs when the master questioned him. R. 683.

The Court of Appeals' decision plainly is based upon a holding that petitioner was *not* a compulsorily employed pilot; in fact, the Court while holding petitioner to standards of knowledge even higher than those required of pilots holds he was actually little more than a tug master. There can be no doubt that petitioner, though acting as pilot, was *not* an involuntary or compulsory pilot, but instead one voluntarily engaged for the convenience of the ship.

The matter is carefully discussed in *Robinson on Admiralty*, pp. 688, 693, and the history and effect of Congressional enactments relating to pilots and classes of vessels is set forth in *Anderson v. Pacific Steamship Co.*, 225 U.S. 187, and *Huus v. N. Y. & Porto Rico Steamship Co.*, 182 U.S. 392. As the latter case shows, Congress has left to the states whether to require vessels engaged in *foreign commerce* (as was of course this ship here) to take pilots. This is particularly clear from Section 211 of Title 46, *United States Code*, reading as follows:

> "46 U.S.C. 211. State regulation of pilots
>
> "Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose. R.S., Sec. 4235."

The statutes of Texas require a vessel engaged in foreign trade to engage a pilot *only* on entering or leaving port. Please see Article 8274, *R. C. S., Texas*, 1925, quoted in Appendix VI below.

It is of course to be noted that Captain Gray held no Texas state appointment and was *not* a branch pilot for Galveston Bay waters.

It is therefore completely clear that the M/V HAR CANAAN had no obligation at law to secure a pilot at all to make the intra-harbor shift. If he had desired to pilot and navigate his ship without outside help, just as he would at sea, the master had a perfect right to do so.

Proceeding further and turning from the law to the facts of the instant case, the vessel's operator Maritime Overseas Corporation, and of course the master of the vessel, were under no *contractual* obligation when they desired or needed to employ tugs to engage any dead-ship pilot to assist in shifting the vessel. While the agreed contract provides that Maritime Overseas Corporation would engage all its *tug power* from Bay-Houston Towing Company, *nowhere in the agreement* is there any provision that it could not obtain as many tugs or as much tug power as it thought it needed without requesting a dead-ship pilot to assist the master in shifting the ship. It could employ any pilot anywhere available as it might desire. The contract of course provided that the tug company (whose business was providing *tug power*, not providing pilots) would have no responsibility of any kind for the acts of *any* pilot. The agreement is not restricted to any employees of the towing companies who might have pilot's licenses, but covers *any pilot*, whether usually employed by the tug company or not.

Petitioner respectfully submits, therefore, that the Courts below are in clear error in requiring him to indemnify the vessel's liability, because he was a subordinate of the master and subject to his orders and the master actively was a party to the dropping of the anchor and at law certainly equally responsible with petitioner if not entirely responsible for the consequences of such action.

Cases hardly need be cited to show that here where the pilot was voluntarily engaged to assist him the master did not relinquish his command or responsibility. *Ralli v. Troop*, 157 U.S. 386, *The Oregon*, 158 U.S. 186. The vessel and its operators are of course in such circumstances responsible. *Sherlock v. Alling*, 93 U.S. 99; and please see the discussion in *Homer Ramsdell Transportation Co. v. La Compagnie Generale Transatlantique*, 182 U.S. 406.

Petitioner therefore respectfully urges that to free the vessel and its operator from liability by requiring him to indemnify the vessel against its *in rem* liability is plainly contrary to these cases and to the recent case of *Halcyon Lines v. Haenn Ship Co.*, 342 U.S. 282, where your Honors have expressly held that there is no liability in admiralty between joint tortfeasors. Plainly, the master was equally if not wholly responsible here. Indemnity is of course merely an "extreme form of contribution," as has been pointed out by Judge Learned Hand in *Slattery v. Marra Bros., Inc.*, 186 F. 2d 134.

CONCLUSION

For the reasons set forth above, it is respectfully prayed that this petition for writ of certiorari be granted and that the judgment of the Court of Appeals be reversed in whole and the petitioner freed from liability and indemnified

from any liability by the vessel, or reversed in part and the liability of the respondent pipe line owners for half-damages decreed, and petitioner be held not required to indemnify the claimant of the M/V HAR CANAAN, and such claimant be held liable for a proportionate part of any damages.

Respectfully submitted,

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that service of the within petition for writ of certiorari was made upon McLeod, Mills, Shirley & Alexander, 801 Santa Fe Building, Galveston, Texas, attorneys for respondents, and Lustham, Watson, Dale & Forney, 538 Mellie Esperson Building, Houston, Texas, attorneys for respondent Maritime Overseas Corporation, claimant of the M/V HAR CANAAN, by mailing copy of the same to them at their addresses shown, this day of July, A. D. 1961.

ROBERT EIKEL

APPENDIX I.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18619

EMMETT GRAY, G & H TOWING COMPANY and MARITIME OVERSEAS CORPORATION,

Appellants,

v.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(March 15, 1961.)

Before TUTTLE, Chief Judge, HUTCHESON, Circuit Judge, and CLAYTON, District Judge.

HUTCHESON, Circuit Judge: This appeal is from findings and a judgment in admiralty in favor of the libellants, in a suit brought by them as owners of pipe lines, for damages resulting from their negligent destruction in the course of shifting the M/V Har Canaan as a dead ship to a slip in Galveston Harbor.

A great deal of testimony was taken on the issue of fault, and the district judge made full findings in effect that the destruction of the pipe lines was due to the negligence of the respondent, Emmett Gray, port captain for G & H Towing Co., who was furnished by it as a pilot for the dead ship movement.

Based on these findings, the court adjudged: (1) Gray liable; (2) the Har Canaan liable in rem; (3) Maritime Overseas, owner of the Har Canaan, not liable in personam; and (4) G & H Towing Co., the employer and furnisher for the movement of Emmett Gray, its port captain liable in personam. He also denied and awarded indemnity as follows:

> "Thus, as to the liability over between the several respondents, the following conclusions are made.
>
> "6. G & H Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the Har Canaan, for any payment they may be required to make under the decree to be entered herein.
>
> "7. Maritime Overseas Corporation, as claimant of the Har Canaan, is entitled to indemnity from Captain Emmett Gray, individually, and from G & H Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G & H Towing Company to Maritime Overseas will be joint and several."

Gray, as the respondent held primarily liable, here insisting that the findings and conclusions, that he was negligent in handling the ship so as to cause injury to the pipe lines, are clearly erroneous, launches massive attacks upon the findings, that he was negligent, and urges upon

us that the cause of the injury to the pipe lines was negligence not on his part but on the part of the pipe line owners in not properly laying and maintaining the lines in place and in not clearly and properly marking their location.

The other appellants join him in this attack and argue mightily that the district judge has misconceived what actually occurred and that the findings of negligence are against the truth and right of the case.

The G & H Towing Company, in addition to its attack upon the negligence findings of the court, strongly attacks the court's conclusion, that the clause in its contract providing in effect that it would not be liable for the acts of pilots furnished by it would not avail it, as an erroneous conclusion of law, and urges that, because of that clause, Gray's negligence would not be imputed to it, and it could not, therefore, be held liable for it.

The Har Canaan and Maritime Overseas Corporation, its owner, argue vigorously that they were not responsible and cannot be held liable for the negligence of the pilot. Each of these argue that the conclusions on idemnity are wrong.

For the reasons hereafter stated, we are of the opinion: that the district judge was right throughout in his findings of fact and in his conclusions of law, that Gray was guilty of negligence in causing the anchor to be dropped upon the pipe line, and that, as a result of his negligence, he and the other respondents found liable are liable to the pipe line owners for the damage done them; and that the right of exoneration, action over, or indemnity is as he concluded it to be.

Taking up first the primary question of whether the findings of fact as to fault should be set aside, we think

it sufficient to briefly say that the matter of fault or negligence is a disputed issue, and that, on the record as a whole, there was ample evidence for the district judge to find, as he did: that Gray and, therefore, the Har Canaan and its owners, and the G & H Towing Company knew that the pipe lines were laid in the slip under permit; that the burden was heavily upon them to show, in defense of their act in dropping the anchor, that they had made proper inquiries as to just where they were laid; and that due care had been used in dropping the anchor to avoid striking and injuring them in the course of the ship's movement; that, in short, Gray and the other respondents could not shift liability for the affirmative acts causing injury to the pipe line as a result of dropping the anchor on the lines by complaining here that, as matter of law, the pipe line owners were at fault in not marking more precisely the position of the lines, or that the findings that they were not are clearly erroneous.

In declaring these views, we are not holding that the district judge could not have found the fault and responsibility as these contend he should have. We are holding, though, that it was entirely proper for the district judge to find, as he did, upon the whole facts, that the proximate cause of the injury sued for was the failure of Gray to use due care to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines, he dropped the anchor on them with damaging results.

With the highly important question of primary fault for the injury thus disposed of by our holding that the court's findings as to Gray's negligence are not clearly erroneous and must be approved, we turn to the other questions raised by the several appellants.

The first of these is the complaint of all the appellants, including Gray that the district judge erred in refusing to give effect to the pilotage clause[1] in the towing contract, providing in effect that neither Gray nor the Towing Company, his employer, would be liable for the negligence of Gray, its employee, indeed its port captain.

Of this, we think it sufficient to say that we agree with the district judge's conclusion that the libellants, strangers to the contract, cannot, of course, be held bound, or in any way affected, by its terms; and also with his conclusions with respect to actions over for exoneration or indemnity that appellants are bound and precluded by the decision and holding in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, that such a clause is invalid. In addition, we think it clear that respondents' reliance on *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, will not at all do there, both because of the decision in the Bisso case, which, on full consideration, rejected the Dalzell case as authority for the position here taken, and because the Dalzell case dealt with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots, and Gray in the case was not such a pilot. Though called a pilot, he was merely the person in direct command with respect to a dead ship towing operation

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[1] "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel, or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for (sic) any act, omission or order of said pilot."

who, as such, conducted the operation by coming on board. Look at it as one will, nothing more can be made of this case than that it is a mere case of a towing service furnished by G & H Towing Company and performed by its port captain who, though denominated "pilot", was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship, and the effort to limit the liability of the towing company for the acts of those furnished by it to conduct the towing maneuver must fail here, just as it failed in the Bisso case, and the judgment denying effect to the invoked clause of the contract must be affirmed.

We are also of the opinion that there is no merit whatever in Gray's claim that he is protected from liability for his own fault by the terms of the contract, even if it were otherwise regarded as valid. Neither is there any merit in the claim of Maritime Overseas Corporation and Har Canaan, that they are not liable for Gray's acts because, under the law governing pilotage, they could not be held liable for the pilot's negligence. We find nothing in the cases cited by them, nothing in the cases generally, which supports this claim. Indeed, we think the cases have settled the law to the contrary, even in a case of true involuntary or compulsory pilotage. Cf. *Publicker Industries, Inc. v. Tug Boat "Neptune" Company et al*, 171 F(2) 48; *United States v. Chris Nielson*, 349 U.S. 129. We are, therefore, of the clear opinion that the court's findings of fact as to fault in the injury to the pipe lines cannot be set aside as clearly erroneous; that his conclusions, that the respondents held liable were in fact and in law responsible to the libelants, are correct and may not be set aside; and that all questions as to actions over for exoneration and/or indemnity were correctly decided, and the decree is in all things AFFIRMED.

APPENDIX II

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

This proceeding is brought in rem against the Israeli vessel HAR CANAAN, claimed by Maritime Overseas Corporation; in rem against the Tug J. R. GUYTON, owned by Bay-Houston Towing Company; in rem against the Tugs JUNO and ALBATROSS, owned by Suderman & Young Towing Company; and in personam against Bay-Houston Towing Company; Suderman & Young Towing Company, and G. & H. Towing Company, the charterer and operator of the three tugs named, and Emmett Gray, an individual, employed as Port Captain by G. & H. Towing Company. The Libellants are Pelican Island Development Corporation, the owner of the pipeline work which was damaged in this casualty; Merritt-Chapman & Scott Corporation, general construction contractor for the Pelican Corporation; Edwin E. Johansson, sub-contractor under Merritt-Chapman & Scott for construction of water and sewer pipelines between Galveston Island and Pelican Island; and Kansas City Bridge Company, sub-contractor under Johansson for the cross channel portion of this construction which was immediately involved. By impleading petition of cross-libel, Maritime Overseas Corporation asks indemnification from the Tugs J. R. GUYTON, JUNO, and ALBATROSS, and from all the named respondents, for any recovery libellants may obtain against the HAR CANAAN or her claimant, and by impleading petition or cross-libel, those same respondents jointly and severally ask indemnification from Maritime Overseas Corporation for any recovery libellants may obtain against them.

A trial having been had on the issues of liability alone, and having received and considered the evidence and the briefs and arguments of the proctors for the respective parties, these Findings and Conclusions are made by me pursuant to Admiralty Rule 46½.

FINDINGS OF FACT

1. The channel between Galveston Island and Pelican Island is a part of the Galveston harbor. Slip A is immediately west of Pier 41 on the Galveston Island or southerly side of this channel. The width of the channel at this point is approximately 1400 feet, and the channel at this point is dredged to a depth of approximately 35 feet between the harbor lines, a distance of 1125 feet.

2. On April 12, 1956, a permit was issued to libellants through the office of the United States Corps of Engineers for the construction of water and sewer mains, each approximately 12 inches in diameter, to be laid in a trench across the Galveston channel, and at a depth not less than 50 feet below mean low water. By amendment of the permit on December 16, 1957, the center line for this crossing, at the southerly or Galveston Island end, was established at a point which the evidence shows to be approximately 18 feet eastward from the northeast corner of Slip A, and the line of bearing for the crossing from that point was N 10° 23' 25", or almost directly across the channel to a point opposite on Pelican Island.

3. Acting under this permit, as originally issued and so amended, Merritt-Chapman, as general contractor for the Pelican Corporation, contracted with Johansson for the construction of these pipelines, and Johansson in turn subcontracted to Kansas City Bridge Company that part of the work which involved laying the sub-aqueous lines. A

trench was dredged across the channel to the necessary depth of 51½ feet, which was approximately 16 feet deeper than the normal depth of the channel between the harbor lines. The dredged trench followed the center line of the crossing as established by the amended permit, and extended about 50 feet to either side of that centerline. This portion of the work was completed prior to November 27, 1957, and soundings of the trench were made by the United States Corps of Engineers on that date. Late in 1957, Kansas City Bridge Company began receiving sections of the steel pipe to be laid at a job site at the Pelican Island end of the crossing, and for sometime thereafter was engaged in welding st. .t sections of this pipe into 400 foot lengths, testing the welds, and covering this pipe with a protective wrapping. Meanwhile, in December, 1957, and January, 1958, a large "whirley" or crane barge was used to dredge the ends of the trench, outside of the harbor lines. A cavein of the bulkhead at the northeast corner of Slip A, caused by this dredging, was repaired in December, 1957. In January, 1958, a bulldozer was used to cut a 400 foot ditch on Pelican Island into which the long sections of pipe could be placed preparatory to their being drawn into the water.

4. On January 27, 1958, pulling cables were stretched across the channel, and the leading section of each pipeline was hung below a barge at the Pelican Island end. On the ensuing four days, the two pipelines were drawn behind this barge and laid in the trench across the channel which had been dug to receive them. On January 31, 1958, the channel was cleared again for marine traffic. Between February 6 and February 25, 1958, the whirley barge was employed as riser sections were welded to the two pipelines, first at the Galveston Island end, then the Pelican Island end. Between February 27 and March 4, 1958, divers

were used to walk the pipelines and ascertain their position and alignment. The whirley barge was used to uncross the lines at one point in mid-channel during this work. On March 5, the lines were filled with water for hydrostatic pressure tests, and they remained filled with water until the later casualty.

5. The remaining work on the pipelines prior to the casualty in suit, which occurred on March 21, 1958, was concerned with the construction of a thrust block over the risers at the Galveston Island end, just east of the entrance to Slip A, and immediately in front of the bulkhead between Slip A and Pier 41. Sleeves were welded around the risers where they passed through the bulkhead, a wooden form was constructed for the thrust-block, and this was lowered into place over the risers after the ground had been cleared by a diver. On the morning of March 21, and at the time of the casualty, concrete was being poured for this thrust-block. A diver was then below directing this work, and his tenders were on the deck of the whirley barge which lay at the northeasterly corner of Slip A, and partly into that Slip. The crane of the whirley barge extended over the work area. On the channel side of the bulkhead, a small "sea mule" and a larger flat barge were immediately above and adjacent to the work area, and personnel employed by Kansas City Bridge Company were on these work boats as well as upon the bulkhead.

6. In addition to the physical evidence already related showing the construction and placement of these pipelines across the channel, and to the notice thereof contained in the permit issued by the United States Corps of Engineers, at least three "Notices to Mariners" had been issued by the Corps of Engineers, on November 15, 1957, December 23, 1957, and January 16, 1958, advising of this construc-

tion. On December 30, 1957, double signboards, measuring 7 feet 10 inches, by 16 feet, on each face, and bearing large letters reading "WARNING--PIPE CROSSING—DO NOT DRAG ANCHOR" were placed on either side of the channel, the sign on the Galveston side being centered about 31 feet east of the center line established for the crossing, and the sign on the Pelican side being centered about 115 feet east of this center line. The legend of either sign was easily visible to any ship proceeding up or down the channel.

7. The Israeli ship HAR CANAAN is a dry-cargo vessel of 10,311 gross tons. Her length is 515 feet 2 inches, and her beam is 66 feet 7 inches. She carried two anchors forward, each weighing approximately 8900 pounds. At the time of this casualty the ship was light and drawing approximately 10 feet. Her forecastle deck was approximately 40 feet above the water line, her bridge deck was approximately 60 feet above the water line, and the horizontal distance from the hawse-pipes in the bow of the ship to the bridge was about 200 feet.

8. On the morning of March 21, 1958, the HAR CANAAN was fully manned, equipped and seaworthy excepting that her main engines were shut down for repairs. Her agents at Galveston, Strachan Shipping Company, gave an order to Bay-Houston Towing Company to furnish three tugs and a pilot to move the HAR CANAAN as a "dead" ship from Pier 15, where she was then lying, to Sunset Grain Elevator at the inner end of Slip A. The distance between these points was approximately two miles.

9. Bay-Houston Towing Company held a contract with Maritime Overseas Corporation, operator of the HAR CANAAN, to move its vessel on stated rates and terms.

10. The only towing companies offering tug service for shifting ocean going vessels in the port of Galveston at the time in question were Bay-Houston Towing Company, Suderman & Young Towing Company, and Intracoastal Towing & Transporation Company. Each of these companies owned a number of harbor tugs. These three "owning companies" competed with one another in the sense that they solicited their own business, made their own contracts, and invoiced the towed vessels for the service performed. However, the services which were available to the owners and operators of ocean going vessels in the port of Galveston from the three "owning companies" were identical. This comes about in that the three "owning companies" did not operate their own tugs, but all three chartered, bareboat, their tugs to G. & H. Towing Company, an operating Company, which was owned jointly by the three "owning companies". In carrying out the orders for towing service, G. &. H. Towing Company would use the tugs which were most readily available and convenient, without regard to the ownership, and regardless of which of the three "owning companies" may have had the contract with the vessel to be towed. The contracts between the "owning companies" and the vessels (or their owners or charterers) expressly allowed for performance in this manner. The contracts offered by the three "owning companies" (their owners or charterers) were identical in terms, and upon a single printed form. The rates too were the same, save for an exclusive contract a ten percent (10%) reduction was allowed. The contract with Maritime Overseas was of this nature, and carried the ten percent (10%) discount.

11. Among the other provisions of this contract, to which reference is made for all purposes, was the following

provision, which by reason of its significance is quoted here:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect to all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

12. Captain Emmett Gray, one of the respondents, is full time and salaried employee of G. & H. Towing Company. Prior to March 1, 1958, he had served for several years as night dispatcher for G. & H., and on that date he became Port Captain for G. & H., and was placed in full charge of the dispatching office. Since 1932, he has held an unlimited pilot's license covering Galveston harbor, as well as other adjacent waters. As Port Captain for G. & H., he was the "dead ship" pilot assigned by his employer for all shifting of dead ships within Galveston harbor when the tugs operated by G. & H. were employed. Out of the fixed charge made for shifting a vessel without her power, Captain Gray received a percentage of this charge (in addition to his salary from G. & H.), with the balance of the charge going to the company owning the contract (one of the three "owning companies"), and G. & H. as the operating company. In this regard, it should be noted that Captain Gray's duties with G. & H. did not contemplate,

nor did he accept, employment as a harbor or branch pilot (meeting incoming vessels at the sea buoy, and bringing them, usually under their own power, into Galveston harbor, with converse service for out going vessels.)

13. On the morning of March 21, 1958, Captain Gray boarded the HAR CANAAN as she lay at Pier 15, and assumed the conning of the vessel. He informed her Master of his intention to use the port anchor in turning the ship into Slip A, and the First Mate of the HAR CANAAN, with a deck crew, was stationed in her bow and the anchor made ready for use on orders from the bridge. Thereupon, the HAR CANAAN was moved westerly down the channel toward Slip A, with the Tugs JUNO, ALBATROSS, and J. R. GUYTON, made up alongside and providing the only motive and directional power for the vessel under orders given directly to them by Captain Gray from the bridge of the HAR CANAAN. The Master of the HAR CANAAN was also upon the bridge of his vessel at all times during the maneuver, and he relayed to the First Officer in the bow and the crew orders as received from Captain Gray during the maneuver, including the order to let go the port anchor. The helm of the HAR CANAAN was lashed, as her propelling machinery was shut down, and she had no steerageway of her own.

14. Shortly after noon, as the HAR CANAAN reached the vicinity of Pier 41, she was navigated by the tugs at an angle from the center of the channel toward the opening of Slip A. Captain Gray then ordered the port anchor to be dropped, with one shot of chain, and this order was promptly executed. Subsequently, the bow of the ship, with anchor down, continued to move toward the northeast corner of Slip A and came within about 10 feet of contact with the whirley barge in that position before the anchor was heaved in some five minutes later. Almost im-

mediately after the anchor was dropped, violent movements of the sewer pipe, which was westerly of the two pipes being laid, were perceptible to the workmen on shore as well as to the diver working underwater. Sounds such as would have been caused by the breaking of the pipeline were also heard by the workmen on shore when the anchor of the HAR CANAAN was heaved in. Subsequent investigations did show that the sewer line was badly bent or broken, but still in the trench, at a point approximately 250 feet out in the channel, and was completely broken at a point only 90 feet from the bulkhead, with the ends of the pipe at this point pulled out of the trench and lying in front of the opening to Slip A.

15. Immediately prior to the arrival of the HAR CANAAN at Slip A on the 21st of March, 1958, the water and sewer lines were being constructed by libellants in accordance with the permit duly issued for that purpose, and these two pipelines were properly situated at the depth and in the position prescribed in such permit, as amended December 16, 1957.

16. The port anchor of the HAR CANAAN was dropped on, or dragged over, one, or perhaps both of said lines, on March 21, 1958, breaking the sewer line, the more westerly of the two, and causing damages to each of the libellants in amounts to be determined.

17. Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipelines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible.

18. Captain Gray was not misled by the position of the warning signs, and was negligent in giving the order to drop the anchor without regard to the presence of the pipelines.

19. The tide was nearing the end of the ebb, and the wind was from the southeast at force three, although neither weather, wind nor tide were factors of any consequence in the handling of the HAR CANAAN at the time, and no emergency or necessity required that the anchor be dropped at the place where it was dropped.

20. Captain Gray was acting within the scope and course of his employment by G. & H. Towing Company at all times material hereto, and was not a loaned servant to the vessel or her operators at such times.

21. The Master of the HAR CANAAN was not negligent in failing to intervene, or displace, the pilot when the order to drop the anchor was issued by Captain Gray, because the situation was not one of obvious danger, and the pilot's lack of knowledge was not manifest so as to warrant intervention by the Master.

22. Neither the Master nor crew of the HAR CANAAN was negligent, or at fault, in any particular.

23. The assisting tugs were properly maneuvered by their crews in accordance with orders given them, and were in no way at fault.

CONCLUSIONS OF LAW

1. Captain Emmett Gray is personally liable for his own acts of negligence.

2. G. & H. Towing Company is liable for the negligence of Captain Gray as its employee.

3. The HAR CANAAN is liable, *in rem*, for the negligence of Captain Gray as her pilot.

4. Libellants are entitled to recover their provable damages, as their interests may appear, from the HAR CANAAN, *in rem*, from G. & H. Towing Company, *in personam*, and from Emmett Gray, individually. The liability so decreed shall be joint and several.

5. Libellants are not entitled to recover from the tugs J. R. GUYTON, JUNO, or ALBATROSS, in rem, or from Bay-Houston Towing Company or Suderman & Young Towing Company, in personam.

The foregoing Conclusions dealing with the liability of the respondents to libellants, in my judgment, follow quite readily from the Findings of Fact set out above, and present no serious question of law.

The libellants obviously were not parties to the contract of towage between Maritime Overseas and Bay-Houston, and the liability of respondents to libellants has been determined without regard to the provisions of such contract.

In considering the question of liability over between the various respondents, however, the validity of the so-called "pilotage" clause (Finding No. 11) is placed in issue.

Maritime Overseas contends such provision is void, as contrary to public policy, relying primarily on *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, and the related opinions immediately following. Respondents G. & H. and Captain Gray in supporting the validity of the exclupatory provisions rely primarily on *Sun Oil Co. v. Dalzell Towing Co., Inc.*, 287 U.S. 291.

Under the facts found above, in my judgment, *Bisso* is controlling, by reason of the following circumstances, which I consider to have been stressed by the Court; (a) the vessel was being moved entirely under the power of the furnished tugs, and without power or control of her own; and (b) by reason of the monopolistic situation which prevailed in the vicinity of Galveston harbor, whereby a vessel had no freedom of choice in the type of towing contract offered, but must accept a contract with such exculpatory provisions if in fact it was to secure the assistance of tugs in its movement. Here, as in *Bisso*, the vessel was under complete control of Captain Gray, as an em-

ployee of the towing company, and such towing company did "have power to drive hard bargains."

The instant case is distinguished from *Dalzell* in these same particulars, for there the Court points out (a) "It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power."; and (b) "Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. . . . . There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

Thus, as to the liability over between the several respondents, the following Conclusions are made.

6. G. & H. Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the HAR CANAAN, for any payment they may be required to make under the decree to be entered herein.

7. Maritime Overseas Corporation, as claimant of the HAR CANAAN, is entitled to indemnity from Captain Emmett Gray, individually, and from G. & H. Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G. & H. Towing Company to Maritime Overseas will be joint and several.

The Clerk of the Court will furnish counsel of record a copy hereof.

Counsel will present appropriate order promptly.

Done at Houston, Texas, this 24th day of December, 1959.

BEN C. CONNALLY
United States District Judge

APPENDIX III

No. 18619

JUDGMENT

Extract from the Minutes of March 15, 1961

EMMETT GRAY, G. & H. TOWING COMPANY, and MARITIME OVERSEAS CORPORATION,
Appellants

v.

EDWIN F. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION and PELICAN ISLAND DEVELOPMENT CORPORATION,
Appellees

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Emmett Gray and G. & H. Towing Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX IV

PERTINENT CONTRACT PROVISIONS

BAY-HOUSTON TOWING CO.

* * *

"The rates quoted herein, and the furnishing of tug power for harbor or other towage undertaken hereunder, are founded on the consideration that this agreement shall not be construed to be a personal contract, and it is understood that

BAY-HOUSTON TOWING COMPANY

and the parties at interest with us shall have the benefit of the exemption from liability contained in the United States Limitation of Liability Statute, Title 46 U.S.C.A. 181 to 184, both inclusive.

_____, 195__

"The Bay-Houston Towing Co. offers to meet your steamers upon arrival at Galveston, Houston, Texas City, Corpus Christi, or Port Aransas, and provide tugboat power for your steamers while in port, in accordance with towboat tariff shown herein and conditions named therein.

"Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs.

"Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot.

"This contract to become effective on the date shown above and to remain in force until _____ and to continue thereafter from year to year until cancelled by either party on an anniversary date of this contract. After written notice, rates named herein may be adjusted in the light of increase or decrease in operating expenses due to changes in laws or regulations and changes in working conditions of labor and labor costs in all branches.

"All charges are net, except when services are performed under contract, then a discount of 10% is to apply on all tariff rates.

BAY-HOUSTON TOWING COMPANY

By _____

ACCEPTANCE

"We accept the offer of the Bay-Houston Towing Co. for all tug power our steamers, or steamers operated for our account, unless otherwise bound by charter may require at the Ports of Galveston, Houston, Texas City, Corpus Christi and Port Aransas, in accordance with the rates and conditions named in tariff shown herein.

_____

By_____"

(In the provisions covering Assisting Vessels, at Galveston-Texas City, but not under the provisions for services at other named ports, the contract had a provision "Pilotage-Shifting Vessels Without Own Power . . . . . 60.00")

APPENDIX V





TUGS:

C. R. HADEN
H. O. WEATHERBEE
J. R. GUYTON
JENNIFER GEORGE

LAURA HADEN
LUCY HADEN
R. T. McDOW
R. J. WALES

W. A. WANSLEY

[redacted] BARBARA GEORGE
J. HARRIS MASTERSON

TUG BOAT HARBOR TARIFF

EFFECTIVE APRIL 10, 1957

BAY-HOUSTON TOWING CO.

GALVESTON

504 National Hotel Bldg
Phone 5-9381
Pier 10 Wharf Phone 3-4673

Night Phones { 3-4673 5-7534 / 5-8542

HOUSTON

811 Cotton Exchange Building
Phone CApitol 2-6231
Dock Phone WAlnut 8-5406

Night Phones { JAckson 4-8835 / UNderwood 9-2701

CORPUS CHRISTI

Ore Dock
Phone: TUlip 4-8791 & TUlip 3-7843
Night Phone: 53 Ingleside

Gulf Coast Towing, Harbor Towing, Oil Lightering and Transportation

OIL BARGE IPB 201

CORRESPONDENCE AND WORK SOLICITED

B Tug Calls: _____ **(Long, Short, Long)**
H Tug Calls: _____ **(Long, Short, Long, Short)**

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

ASSISTING VESSELS

GALVESTON — TEXAS CITY

Docking or Off Docking, at Galveston, per tug	$180.00
Shifting, Dock to Dock, per tug	205.00
Off docking and to Bolivar Roads, per tug	230.00
Off docking and to Texas City and Docking, per tug	330.00
Bolivar Roads to Texas City or vice versa, per tug	230.00
Docking, Off Docking, or Shifting at Texas City, per tug	230.00
Towing vessels or ocean-going barges from Galveston Bar to Bolivar Roads, Texas City or Galveston Docks, per tug. Per hour or fractional part Running time chargeable.	105.00
Shifting derrick barges—Galveston Harbor	85.00
Galveston to Bolivar Roads	85.00
Galveston to Texas City	135.00
Pilotage—Shifting Vessels Without Own Power	60.00

SPECIAL SERVICES

Pulling on ships aground	
When tug is engaged in assisting vessel, one-half hour free pulling time, each succeeding hour or fractional part	$ 80.00
When Tug not engaged in assisting vessel: Per hour or fractional part Running time chargeable.	95.00
Furnishing and delivering water to ships at anchorage: Per Trip	200.00

IN TOWING VESSELS OR BARGES, TOWED VESSELS TO FURNISH HAWSERS.

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $60.00 at Galveston and $90.00 at Texas City will be made.

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $60.00 per hour, with one half hour free time allowed.

HOUSTON SHIP CHANNEL

BETWEEN	
Morgan's Point and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	$380.00
Morgan's Point and Baytown	230.00
Bolivar Roads and Morgan's Point or Baytown	430.00
Bolivar Roads and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	455.00
Galveston and Baytown	440.00
Texas City and Baytown	440.00
Houston and Norsworthy, Crown, Galena or Sinco	240.00
Houston and Todd Shipyards, Port Adams, Sheffield, Shell or Ordnance Depot	330.00
Galveston and Houston	580.00
Bolivar Roads and Houston	580.00
Texas City and Houston	580.00
Morgan's Point and Houston	430.00
Houston and Baytown	405.00
Baytown and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	380.00

(Norsworthy, Crown, Galena, Sinco, Clinton, Manchester take same rates as Houston from above points.)
Above charges including Docking or Off Docking.

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

HOUSTON SHIP CHANNEL
DOCKING AND OFF DOCKING

Docking or Off Docking at all points between Manchester Terminal and Turning Basin, both inclusive	$180.00
Docking or Off Docking at points below Manchester to Norsworthy, inclusive	195.00
Docking or Off Docking at points below Norsworthy to Ordnance Depot, inclusive	240.00
Docking or Off Docking at Baytown	230.00

SHIFTING

Shifting vessels between docks at Manchester Terminal and Turning Basin, both inclusive, per tug	$205.00
Shifting vessels between points below Manchester to Norsworthy, inclusive, per tug	270.00
Shifting vessels from one point to another on the same dock between points below Norsworthy to Ordnance Depot, inclusive	290.00
Shifting vessels between points below Norsworthy to Shell, inclusive, per tug	330.00
Shifting from one berth to another at Baytown	230.00

MISCELLANEOUS SERVICES

Pulling on ships aground
- When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part — 80.00
- When tug is not engaged in assisting vessel, per hour or fractional part — 95.00
  - Running time chargeable

The above rates to apply for a single tug
- Tugs ordered to stand by but not put to work will be charged for the same as if pulling

Rates for towing dead ships between points on Houston Ship Channel, other than above specified, will be charged for on "pulling time basis."
All towed vessels to furnish towing hawsers
Hoking vessels off dock and redocking, shifting rates to apply
Standing by or holding vessel in stream or alongside bank waiting for berth, pulling time rate will apply
When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charge of $60.00 will be made

Furnishing and delivering water to ships, Per Trip	200.00

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $60.00 per hour, with one-half hour free time allowed

PORT ARANSAS — CORPUS CHRISTI

Docking, off docking or shifting at Harbor Island	$280.00
Assisting between Harbor Island and Corpus Christi	430.00
Sea to Ingleside	380.00
To dock at Ingleside:	
When tug is at Ingleside	290.00
When tug is not at Ingleside	380.00
Assisting between Ingleside and Harbor Island	380.00
Assisting between Ingleside and Corpus Christi	380.00
Sea to Corpus Christi and dock	430.00
From outside bridge at Corpus Christi and to dock at Turning Basin wharves	210.00
To dock at wharves in Corpus Christi Turning Basin	180.00
Shifting in Corpus Christi Turning Basin	205.00
Sea to Terminal of the Reynolds Metal Company (Near Ingleside)	395.00
Docking or undocking at the Terminal of the Reynolds Metal Company (Near Ingleside)	395.00
From outside bridge to all points between Sunray Dock and Oil Docks 3 & 4, inclusive	230.00
From Turning Basin inside the bridge to above docks	220.00
To docking or off docking at above docks	220.00
To shifting between above docks or between above docks and docks in Corpus Christi Turning Basin	220.00

Pulling on ships aground
- When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part — 80.00
- When tug is not engaged in assisting vessel, per hour or fractional part — 95.00
  - Running time chargeable

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $60.00 at Corpus Christi and Harbor Island, and $80.00 at Ingleside, will be made
The above rates to apply for a single tug

Detention - One half hour free time, thereafter, per hour	60.00
Furnishing and delivering water to ships at Harbor Island, Ingleside, or Corpus Christi, Per Trip	200.00

OVERTIME RATE

20% will be added to the tariff rates for all work performed between the hours of 5 P.M. and 7 A.M., also for work performed on Sundays and Holidays and Mondays following Holidays.
Overtime Rate to apply when service is started and or completed in an overtime hour.
Starting time will be the time Tug leaves berth and time of completion will be the time Tug returns to berth.

FORCE MAJEURE

Neither party shall be responsible for delays, failures or omission hereunder due to strikes, lockouts, labor disturbances, riots, fire, earthquakes, storm, lightning, epidemics, war disorders, acts of God, etc.

The rates quoted herein, and the furnishing of tug power for harbor or other towage undertaken hereunder, are founded on the consideration that this agreement shall not be construed to be a personal contract, and it is understood that

BAY-HOUSTON TOWING COMPANY

and the parties at interest with us shall have the benefit of the exemption from liability contained in the United States Limitation of Liability Statute, Title 46 U.S.C.A. 181 to 184, both inclusive.

_____, 195__

The Bay-Houston Towing Co. offers to meet your steamers upon arrival at Galveston, Houston, Texas City, Corpus Christi, or Port Aransas, and provide tugboat power for your steamers while in port, in accordance with towboat tariff shown herein and conditions named therein.

Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs.

Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engage or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot.

This contract to become effective on the date shown above and to remain in force until _____ and to continue thereafter from year to year until cancelled by either party on an anniversary date of this contract. After written notice, rates named herein may be adjusted in the light of increase or decrease in operating expenses due to changes in laws or regulations and changes in working conditions of labor and labor costs in all branches.

All charges are net, except when services are performed under contract, then a discount of 10% is to apply on all tariff rates.

BAY-HOUSTON TOWING COMPANY

By _____

ACCEPTANCE

We accept the offer of the Bay-Houston Towing Co. for all tug power our steamers, or steamers operated for our account, unless otherwise bound by charter may require at the Ports of Galveston, Houston, Texas City, Corpus Christi and Port Aransas, in accordance with the rates and conditions named in tariff shown herein.

_____

By _____

APPENDIX VI

Article 8274, R.C.S. Texas 1925. Pilotage

"The rate of pilotage, which may be fixed under Articles 8267 and 8269, on any class of vessels shall not, in any port of this State, exceed Five ($5.00) Dollars for each foot of water which the vessel at the time of piloting draws; and whenever a vessel, except of the classes below excepted, shall decline the services of a pilot, offered outside the bar, and shall enter the port without the aid of one, she shall be liable to the first pilot whose services she so declined for the payment of half pilotage; and any vessel which, after being brought in by a pilot, shall go out without employing one, shall be liable to the payment of half pilotage to the pilot who brought her in, or if she has come in without the aid of a pilot, though offered outside, she shall on so going out be liable for the payment of half pilotage to the pilot who had first offered his services before she came in; but if she has come in without the aid of a pilot, or the offer of one outside, she shall not, in case of going out without a pilot, be liable to half pilotage. At any port where vessels shall receive or discharge their cargoes at an anchorage outside of the bar, such vessel shall be liable to pilotage at the above rate to such anchorage, but shall not be liable for or compelled to pay pilotage from such anchorage to the open seas; and if any vessel bound from open sea to such anchorage, while under way, shall decline the services of a pilot, and shall afterward receive or discharge any portion of her cargo at such anchorage on the lighters or otherwise, she shall be liable for the payment of half pilotage at the above rate to such anchorage to the

first pilot whose services shall have been tendered to and declined by her, but not liable for any pilotage from such anchorage to the open sea; and when a pilot takes charge of a vessel twenty miles outside of the bar, and brings her to it, he shall be entitled to one-fourth pilotage for such off-shore service, in addition to what he is entitled to recover for bringing her in, but if such off-shore services be declined, no portion of said compensation shall be recovered. Acts 1866, pp. 14, 15; G.L. vol. 5, p. 932; Acts 1879, p. 99; G.L. vol. 8, p. 1399; Acts 1951, 52nd Leg., p. 252, ch. 148, Sec. 1; Acts 1953, 53rd Leg., p. 61, ch. 48, Sec. 1."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 276

EMMETT GRAY,
Petitioner

vs.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,
Respondents

RESPONDENTS EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, AND PELICAN ISLAND DEVELOPMENT CORPORATION'S REPLY TO PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY EMMETT GRAY, PETITIONER

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Libellants in the Trial Court—Edwin E. Johans-

son, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation, and Pelican Island Development Corporation—denying jurisdiction as to them and denying error respectfully pray that the petition of Emmett Gray be denied.

The petition of Emmett Gray (Cause No. 276) and the petition of G. & H. Towing Company (Cause No. 277), we believe, both should have been filed by Petitioners in one case rather than splitting a single case into two separate causes, Nos. 276 and 277, in this Court. The case was tried in the Trial Court as a single case and was heard by the Court of Appeals in the same manner. Since, however, separate petitions have been filed here, we deem it necessary to answer separately. However, in order to give this Court the background on each petition, a considerable part of our Reply Statement and Argument will be identical in each cause.

STATEMENT AND ARGUMENT

Libellants below, Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation and Pelican Island Development Corporation (hereinafter referred to as Libellants), being all the parties jointly interested in two pipe lines across Galveston Channel, recovered judgment in the Trial Court in rem against the Motor Vessel HAR CANAAN (whose anchor caught and broke one of these lines and whose claimant is Maritime Overseas Corporation) and in personam against Emmett Gray for his negligence and against G. & H. Towing Company, the

employer of Captain Gray, jointly and severally, for the damages sustained by reason of the negligent dropping of the HAR CANAAN'S anchor (R. 887). The Trial Court held that "Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipe lines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible" and "Captain Gray was not misled by the position of the warning signs and was negligent in giving the order to drop the anchor without regard to the presence of the pipe lines." (Findings Nos. 17 and 18, R. 883-884) and concluded that Captain Gray "is personally liable for his own acts of negligence" (Conclusion of Law No. 1 - R. 884). The Trial Court further found that "Captain Gray was acting within the scope and course of his employment by G. & H. Towing Company at all times material hereto, and was not a loaned servant to the vessel or her operators at such times" (Finding No. 20, R. 884) and concluded that "G. & H. Towing Company is liable for the negligence of Captain Gray as its employee" (Conclusion of Law No. 2 - R. 885). The HAR CANAAN was held liable in rem for the acts of Captain Gray (R. 885). Maritime Overseas Corporation (the claimant of the HAR CANAAN) concedes that if Captain Gray was negligent. the vessel is liable in rem.

Therefore, insofar as these Libellants are concerned, the case involves only fact questions as to the negligence of Captain Gray and his acting in the

course of his employment of G. & H. Towing Company.

Additionally, in the Trial Court, the HAR CANAAN and its claimant—Maritime Overseas Corporation (both hereinafter referred to jointly as Maritime) on one side and Captain Gray and the G. & H. Towing Company on the other side, extensively litigated the question of the so-called "pilotage clause" and the various rights of indemnity and contribution claimed between themselves. Libellants secured a judgment jointly and severally against the HAR CANAAN in rem, Captain Gray and the G. & H. Towing Company. We are not concerned with these various cross-claims as between these three parties.

The HAR CANAAN and its claimant, Maritime Overseas Corporation, appealed, claiming that Captain Gray was not negligent and, therefore, that the ship was not liable. The Court of Appeals on the fact question of negligence held against the Appellants, HAR CANAAN and Maritime Overseas Corporation. These Appellants did not file a motion for rehearing in the Court of Appeals and have not applied for certiorari here. We take it, therefore, that here as between us (Libellants below) and the HAR CANAAN in rem and Maritime Overseas Corporation as claimant, there is no question in dispute or controversy.

G. & H. Towing Company took its appeal and while complaining in part as to the Trial Court's finding of fact that Captain Gray was negligent and an employee of G. & H. Towing Company, primarily argued the effect of the pilotage clause and the indem-

nity features between it, G. & H. Towing Company, and Maritime. Captain Emmett Gray also appealed, contending that under the pilotage clause, he was entitled to some form of exoneration and also that he was not negligent. The Court of Appeals affirmed the Trial Court's findings of fact to the effect that the Appellant, Captain Emmett Gray, was negligent and that he and his employer, G. & H. Towing Company, were liable to us.

The Court of Appeals further held that Maritime was entitled to indemnity over against Gray and G. & H. Towing Company. Again, we are not interested in a controversy between Gray and the G. & H. Towing Company on the one hand and Maritime on the other.

The Petition for Certiorari here primarily deals with the controversy between Petitioner and the HAR CANAAN in rem and its claimant, Maritime Overseas Corporation.(1)

We cannot accept the "Statement" made in the petition as accurate in that it ignores most of the facts favorable to us, but in view of the limited argument made against us and our reply here, we do not believe that it would materially benefit this Court to make a more complete and accurate statement. If the Court

---

(1) Strangely enough, while we are only involved in a minor way, we are named as the sole Respondents in the petition. Maritime Overseas Corporation and the HAR CANAAN are the parties against whom practically everything in the petition is directed but were not made or named as Respondents in the petition.

desires a more complete statement, we refer to Pages 1 to 39 of our brief in the Court of Appeals.

The major portion of Gray's petition here is in connection with the indemnity and contribution features as between him and the HAR CANAAN and Maritime Overseas Corporation. The only part of Gray's petition actually directed against us is the second alleged reason for granting the writ (Petition pg. 14) and the argument in support thereof found under the heading "II" at Pages 24 to 27 of the petition. In such argument Gray takes the position that he has been held liable as an insurer. This is not the holding of either the Trial Court or the Court of Appeals. The basis for the Trial Court's holding is summarized in Finding Nos. 17 and 18 which read as follows:

> "17. Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipe lines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible.
>
> 18. Captain Gray was not misled by the position of the warning signs, and was negligent in giving the order to drop the anchor without regard to the presence of the pipelines." (R. 883-884).

As is also stated in the Trial Court's Conclusion of Law No. 1 which reads as follows:

"Captain Emmett Gray is personally liable for his own acts of negligence." (R. 885).

The Court of Appeals in its opinion recites that the District Judge made full findings "in effect that the destruction of the pipelines was due to the negligence of the Respondent Emmett Gray * * *"; that Gray was contending before that Court that the findings "that he was negligent in handling the ship so as to cause injury to the pipe lines are clearly erroneous * * *"; and further recites that all Appellants attack the findings of negligence in the District Court. The Court of Appeals then states "that the District Court was right throughout in his findings of fact and in his conclusions of law, that Gray was guilty of negligence in causing the anchor to be dropped upon the pipe lines, and that, as a result of his negligence, he and other Respondents found liable are liable to the pipe line owners for the damage done them." The Court further held that it found that it was entirely proper for the District Judge to find "as he did, upon the whole facts, that the proximate cause of the injury sued for was a failure of Gray to use due care to find out where the pipe lines were * * *." The Court further held that the Trial Court's findings "as to Gray's negligence are not clearly erroneous and must be approved."

It is, therefore, clear that both the Trial Court and the Court of Appeals held Captain Gray guilty of negligence as a matter of fact. Neither Court held him liable as an insurer. The question of negligence

here is only a fact question which has been found in our favor by the District Court and affirmed by the Court of Appeals. We submit that Gray's petition should be denied as to us.

In addition, the evidence to support the finding of Gray's negligence is overwhelming. We respectfully call attention to our Brief in the Court of Appeals (Pages 1 to 39) where we summarized the voluminous testimony to support these findings. Gray gave the order to drop anchor (R. 208-209). Gray's petition seems to rely upon the fact that the warning signs were not located exactly and precisely over the lines (being necessarily a little bit off the lines while the construction work was going on - R. 284). We believe it in order to summarize the evidence showing that Captain Gray knew or should have known where the lines were including references to our Brief in the Court of Appeals where a fuller statement of the evidence on each point may be found.

Captain Gray, before giving the order to drop anchor, actually saw where the pipe lines came out of the water on the Galveston side and, therefore, could not have been in any way misled by the location of the warning signs themselves (R. 223; our Brief Pg. 26) and on the Pelican Island side, the risers where the lines came out of the water were plainly visible and could have been seen (R. 207-208 and 237; Pgs. 27-28 our Brief). Plainly visible buoys, which were tied to the lines and were resting on top of the water marking their location, were attached to and marked the loca-

tion of both lines at the time of the accident (R. 268, 303-304, 313, 355, 372, 383-384, 482, 747 and 748; our Brief Pgs. 28-30). The United States Corps of Engineers' Permits (Libellants' Exhibit 4, R. 743-744; our Brief Pg. 30) gave ample notice; the actual dredging of the trench across the Channel (R. 740, R. 253, 746, our Brief Pg. 31) also gave notice. The pipe, which subsequently was put in the trench, was open and easily visible in the trench on the Pelican Island side (R. 258-267, 746; our Brief Pg. 32). The digging of the trench from the harbor line to the bulkhead (R. 260-263, our Brief Pgs. 32, 33) showed the location. The bulldozer dug the small ditches for entry of the line into the Channel (Exhibits 19, 21 and 22, R. 263; our Brief Pg. 30); the actual operation in pulling the lines across the Channel (R. 274-267; our Brief Pg. 33) was well-known. The work done on the risers on the Galveston side (R. 270, 223, 271, 272 and 237; our Brief Pg. 34) was another factor. The Whirly (crane) Barge working at the corner of Slip A and the trimmy pipes showing where the concrete actually was being poured to hold the lines and the sea mule were all present and easily visible on the Galveston side of the line at the time the ship approached (R. 280-281; our Brief Pg. 34). The workmen on the Galveston side were hollering and screaming and waving their hat at the ship (R. 419; our Brief Pg. 35); the Notices to Mariners issued by the United States Engineers' office on November 15, 1957, December 23, 1957 and January 16, 1958 (Libellants' Exhibits 5, 6 and 7; our Brief Pgs. 35-36) and the warning signs (R. 878-879, Libellants' Exhibit 30 and our discussion of these signs at Pgs.

36-38 of our Brief) are further support for the findings of the Trial Court.

In this brief summary of the evidence in support of the Trial Court's finding on this point, we have not gone into the Record in detail but only enough to show that there was ample evidence to support the Trial Court's finding of negligence on the part of Captain Gray and the Court of Appeals' affirmance of the finding.

We, therefore, submit that as to us, the petition should be denied. Again, we are not interested in the controversy between Captain Gray and Maritime as to indemnity and contribution.

We believe the above answers any contentions asserted against us.

There are no questions of law involved as between Gray and us and we submit no basis for the granting of a writ here. Also we further submit that the findings of both the Trial Court and the Court of Appeals are correct on the facts material to us.

If any questions of law are presented here, they are limited to the controversy between Petitioner Gray and G. & H. Towing Company on the one side, and Maritime on the other as to indemnity and contribution. The HAR CANAAN and Maritime are the real Respondents here—not us.

CONCLUSION

The Respondents, Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation and Pelican Island Development Corporation, respectfully pray that the Petition of Emmett Gray be denied, and in the alternative that any grant of certiorari be limited to the controversy between such Petitioner and the HAR CANAAN and Maritime Overseas Corporation.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing Respondents Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corporation, and Pelican Island Development Corporation's Reply to Petition for Writ of Certiorari has been mailed on the 18 day of August, 1961, to Mr. Robert Eikel, 1910 Tennessee Building, Houston 2, Texas, Attorney for Petitioner Emmett Gray and for G. & H. Towing Company, and Eastham, Watson, Dale & Forney, 538 Mellie Esperson Building, Houston, Texas, Attorneys for Respondent, Maritime Overseas Corporation, Claimant of the M/V HAR CANAAN.

Preston Shirley

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IN THE

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October Term
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EMMETT GRAY, *Petitioner*
versus
EDWIN E. JOHANSSON, KANSAS CITY BRIDGE CO., MERRITT-CHAPMAN & SCOTT CORP., AND PELICAN ISLAND DEVELOPMENT CORP., *Repondents*

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

BRIEF OF MARITIME OVERSEAS CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY EMMETT GRAY, PETITIONER

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To the United States Court of Appeals
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BRIEF OF MARITIME OVERSEAS CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY EMMETT GRAY, PETITIONER

To The Honorable, The Chief Justice of The United States
And The Associate Justices of The Supreme Court
of The United States:

Maritime Overseas Corporation is not named as a respondent in the petition of Emmett Gray for Writ of

Certiorari. However, inasmuch as the relief prayed for by Petitioner in the prayer of his petition, if granted, would be prejudicial to the position of Maritime Overseas Corporation, it files this opposition thereto, denying jurisdiction, and denying error, and respectfully prays that the petition of Emmett Gray herein be denied.

Questions Presented For Review

It is the position of Maritime Overseas Corporation that there are no questions properly presented for this Court's review in this case, because the decisions of the District Court and the Court of Appeals were the result of the application of well settled legal principles to facts found on competent evidence. However, if there are any questions to be passed upon by this Court, we certainly do not agree that they are correctly stated in the petition, and those purported questions are therefore challenged as follows:

I.

This case does not present, as Petitioner contends in Article I of its petition, the question of whether a "pilotage" clause of the type generally used in American harbors is lawful. In the first place, the pilotage clause here involved was not of the type generally used in American harbors because it was not restricted to those vessels which were maneuvering under their own power in control of their own crews. Morever, this was not a case, as Petitioner states in his petition, where an ocean going vessel with her master in command upon her bridge and with a full crew at their stations was being shifted by tugs. Instead, this was a case where a dead ship, the main engines of which were dismantled and inoperative, and the helm of which was lashed, was being towed from one berth to another within

the confines of Galveston harbor solely by tug power, and under the command of a towing company employee, the Petitioner Gray, who was furnished by the towing company on its own initiative, not at the request of the vessel to be towed, to direct the shifting operation. This towing company employee, Captain Gray, was on the bridge of the ship actually directing the movement, and although the master of the ship was also on the bridge he was not commanding, and in fact could not command the operation as he was unable to direct the tugs and unable to move his ship in any direction by the use of her own rudder and wheel. There was not, as Petitioner states, a full crew at their stations; there were no engine room personnel at their stations because the engines were inoperable; there was no helmsman at the wheel because the helm was lashed amidships; there was no mate at the engine order telegraph because it was secured. Although Captain Gray was the holder of a pilot's license from the Federal government, he was not a state licensed bar pilot or a member of the Galveston Pilots Association, but was simply the employee of the towing company furnished by the latter to conduct the towing operation. Maritime Overseas Corporation made no contract with Captain Gray to pilot the M/V "Har Canaan", and they paid him no fee for his services. Neither is it true, as is stated in Article I of the petition, that the master ordered the ship's crew to drop the vessel's anchor. It was found as a fact by the District Court in no less than three separate findings (See Findings of Fact No. 17, 18 and 21, R. 883 and 884) that Captain Gray, not the master, issued the order to drop the anchor, and this was an act performed in the course of the towage operation.

While it is true, as Petitioner states, that the towage contract contained no words attempting to relieve the

tugs or their owners from liability for negligent towage, the contract did purport or attempt to relieve the towing company from liability for the negligence of a pilot. Starting with this premise, the towing company then attempts to denominate the employee furnished by it to conduct a towing operation a "pilot" and to denominate the towage service performed "pilotage", and to thereby do by indirection what it could not do directly, that is, to relieve itself from liability for negligent towage. Thus, the question, if any, is not whether Your Honors held in *Bisso v. Inland Waterways Corporation* (1955), 349 U.S. 85, that pilotage clause was invalid, but whether the Courts below in the instant case were correct in holding in accordance with the rule announced by Your Honors in the *Bisso* decision, that a clause which would in effect exempt a towing company from liability for the negligence of its towing employees was invalid and unenforceable regardless of the fact that the towing company attempted to denominate the service which it performed "pilotage" and regardless of the fact that the towing company attempted to denominate its employee a "pilot". The question, if any, we submit was laid to rest by the decision of the Court of Appeals, 287 F. 2d 852 at P. 854 where it was said:

> "Of this, we think it sufficient to say that we agree: with the District Judge's conclusion that the Libellants, strangers to the contract, cannot, of course, be held bound or in any way affected, by its terms; and also with his conclusions with respect to actions over for exoneration or indemnity that Appellants are bound and precluded by the decision and holding in *Bisso vs. Inland Waterways Corp.*, 349 U.S. 85, 75 S. Ct. 629, 99 L. Ed. 911, that such a clause is invalid. In addition, we think it clear, that respondents' reliance on *Sun Oil Co. vs. Dalzell Towing Co.*, 287 U.S. 291, 53

> S. Ct. 135, 77 L. Ed. 311, will not at all do here, both because of the decision in the *Bisso* case, which, on full consideration, rejected the *Dalzell* case as authority for the position here taken, and because the *Dalzell* case dealt with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots, and Gray in this case was not such a pilot. Though called a pilot, he was merely the person in direct command with respect to a dead ship towing operation who, as such, conducted the operation by coming on board. Look at it as one will, nothing more can be made of this case than that it is a mere case of a towing service furnished by G & H Towing Company and performed by its port captain, who, though denominated 'pilot' was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship, and the effort to limit the liability of the towing company for the acts of those furnished by it to conduct the towing maneuver must fail here, just as it failed in the *Bisso* case, and the judgment denying effect to the invoked clause of the contract must be affirmed."

None of the cases cited by the Petitioner in Article I of its brief for the proposition that a pilotage clause is valid is in point in this case, because all of those cases involve situations in which the vessels were actually being controlled by their own crews through the use of their own propulsion and steering machinery and were merely being *assisted* by the pilot and the tugs. They were not cases, as was the one at bar, wherein a ship, without the use of her own propulsion machinery or rudder, and having no control over her own movements, was being moved entirely by tug power under the direction of a towing company employee. Thus, we repeat that the question, if any, is not whether Your Honors held in *Bisso v. Inland Waterways Corp.*, supra,

that a *pilotage* clause is invalid, but whether the Courts below were correct in holding, in accordance with the *Bisso* decision, that such a *pilotage* clause cannot be enforced in a case where it has been found as a matter of fact that *towage* and not pilotage was involved.

Moreover, it will be noted that the District Judge, in his memorandum opinion in this case (R. 873), held that even if the so-called pilotage clause were valid, it would not preclude an award of indemnity to Maritime Overseas Corporation against Captain Emmett Gray because he was not a party to the towing contract, and the said contract was not made for his benefit. This holding was specifically approved by the Court of Appeals (287 F. 2d 852, at P. 854). Hence, the question of validity of the so-called pilotage clause is entirely immaterial to Captain Gray, and has no place in his petition for Writ of Certiorari as any decision regarding the validity of that clause would not affect Gray's liability for indemnity to Maritime Overseas Corporation.

II.

The questions alleged to be presented for review by Petitioner Gray, in Article II of his petition, has to do with the failure of the courts below to accurately mark the pipelines in question, and accordingly, do not affect Maritime Overseas Corporation. However, the Court's attention is invited to the fact that the identification of Captain Gray as a "pilot" throughout the statement of this question is erroneous, Captain Gray having been held to be no more than the towing company employee charged with the responsibility of conducting the towage operation (Please see the opinion of the Court of Appeals in this case, 287 F. 2d 852, at P. 854).

III.

In his statement of the third question purportedly presented for review of this Court (Article III of the petition) Petitioner Gray again misstates the record in this case. This was not a case, as Petitioner states, of a vessel in command of her master with a full crew aboard at their stations being shifted by tugs in a harbor. The District Court found that although the master of the M/V "Har Canaan" was on her bridge, he was not commanding the ship, as the ship did not have the use of her own propulsion or rudder power, and was being moved solely by the tugs which the master was unable to command. Instead, the Court found that Captain Gray, the towing company employee furnished by G & H Towing Co. to be in charge of the overall towing operation, had assumed the conning of the vessel. Captain Gray was not a state licensed bar pilot, and was not a member of the Galveston Pilots Association; he was a full time regular towing company employee, and he made no contract of pilotage with Maritime Overseas Corporation as operator of the M/V "Har Canaan". Again, in this section of his petition, Petitioner states, and again erroneously, that Captain Gray was acting only in an advisory capacity, and that the master of the M/V "Har Canaan" gave the order to drop the vessel's anchor. This is directly contrary to the findings of the District Court, which findings were undisturbed by the Court of Appeals. The District Court found that Captain Gray had assumed the conning of the M/V "Har Canaan" (Finding of Fact No. 13, 882), and that Captain Gray, not the master, gave the order to drop the ship's anchor (Findings of Fact No. 17, 18 and 21, R. 883 and 884). Although the M/V "Har Canaan" was found to be liable in rem, because of the negligence

of Captain Gray who was in charge of her, no in personam liability was found against her claimant, Maritime Overseas Corporation, because neither the master nor any other member of the crew was negligent (Findings of Fact Nos. 21 and 22, R. 884). Hence, the question, if any, is not as stated by Petitioner, whether the vessel was a joint tort feasor with Captain Gray and not entitled to contribution from Gray in accordance with the rule of *Halcycon Lines v. Haenn Ship Co.*, 342 U.S. 282, but whether the Courts below properly held that this was not a joint tort feasor situation at all, but one in which the vessel was held jointly liable solely because of the negligence of Captain Gray, and, therefore, entitled to indemnity (not contribution) against Gray in accordance with the fundamental well settled legal principal that where a vessel is caused to incur in rem liability solely through the negligence of a party not an employee of the vessel owner or operator, the vessel's claimant is entitled to indemnity therefor against the wrongdoer. The decision in the *Halcycon Lines* case has nothing to do with the case at bar because Halcycon involved contribution, as distinguished from indemnity here involved, and joint tort feasors, as distinguished from joint liability. Moreover, the *Halcycon* rule applies only in non-collision cases, and the case at bar is a collision case.

Statement

The incidents giving rise to this litigation occurred on March 21, 1958. At that time, the M/V "Har Canaan", a foreign flag ship, was undergoing repairs on her main engine, which was partly dismantled and inoperative. Her wheel was lashed with her rudder amidship and her engine telegraph was secured. (R. 667, 671). Her master and third

mate were on her bridge and her chief officer and seamen were by her anchors. Her crew was aboard, but under the circumstances were little more than passengers. The ship was scheduled to be shifted from Pier 15 to the Sunset Grain Elevator at Slip A within the Port of Galveston, Texas (Finding of Fact No. 8, R. 879). It was therefore necessary for this shift to be made entirely by tug power (R. 671). Accordingly, Maritime Overseas Corporation's Galveston agent called the office of G & H Towing Company, at Pier 10, Galveston, advised the said G & H Towing Company, which was the only towing company furnishing harbor tugs in the Port of Galveston, Texas (Finding of Fact No. 10, R. 880), that the "Har Canaan" should be shifted at 12:00 noon as a "dead ship" from Pier 15 to Sunset Elevator, and asked the said G & H Towing Company to handle the shifting operation. The three tugs, directions as to their positioning, all maneuvers, and the entire operation were under the sole control of G & H Towing Co., and Maritime Overseas Corporation was interested only in the ultimate result of having the ship berthed at Sunset Grain Elevator. The anchor of this particular vessel is dropped by merely releasing a brake at the electric anchor windlass and its weight carries it out. The ship's master was an infrequent caller at the port, a stranger to the area of the Slip A vicinity, had no knowledge about the pipelines in the vicinity, and had no pilot's license for the port. The ship's agent, in notifying G & H Towing Company when to shift the M/V "Har Canaan", did not specify the number or type of tugs that were to be supplied for the operation, nor did he request that G & H Towing Company furnish a pilot for the operation (R. 726). In response to this telephone conversation, G & H Towing Company furnished the three tugs that moved the ship, and also sent along,

on its own initiative, and for its own benefit and convenience, its port captain and so-called "dead ship" pilot, Captain Emmett Gray, a regular employee of G & H Towing Company, to direct the movement of the flotilla (R. 162). The three tugs so furnished by G & H Towing Company, under the direction of Captain Gray, its employee, supplied the sole motive, maneuvering, navigating and directional power for the movement of the ship throughout the entire operation, and the said Captain Gray, Petitioner herein, gave all orders during the shifting operation, (R. 671, 673, 674). We call attention, at this point, to our quotation from the opinion of the Court of Appeals on Page 4 hereof.

As the flotilla was approaching, and/or entering Slip A, Captain Gray, the employee furnished by G & H Towing Company to be in charge of the overall towing operation, gave the order to drop the ship's port anchor (Findings of Fact Nos. 14 and 17, R. 882, 883 and 884). The anchor brake of the M/V "Har Canaan" was released and the anchor accordingly was dropped as directed, and resulted, according to the findings of the District Court, undisturbed by the Court of Appeals, in damage to one or both of two sub-aqueous pipelines in which the named respondents herein were interested.

The District Court found, upon abundant credible evidence, that Captain Emmett Gray was acting as the employee of G & H Towing Company, at all times material hereto, and was not a loaned servant to the vessel or her operators (Finding of Fact No. 20, R. 884); that the master of the M/V "Har Canaan" was not negligent in failing to intervene or displace Captain Gray (Finding of Fact No. 21, R. 884), and that neither he nor any other officer or member of the crew of the M/V "Har Canaan"

was in any way negligent (Finding of Fact No. 22, R. 884). The Court concluded that G & H Towing Company was liable for the negligence of Captain Gray as its employee (Conclusion of Law No. 2, R. 885), and that the M/V "Har Canaan" was liable "in rem" for the negligence of Captain Gray because he was lawfully in charge of her. No in personam liability was found against Maritime Overseas Corporation, claimant of the M/V "Har Canaan". The District Court awarded indemnity to Maritime Overseas Corporation, as claimant of the M/V "Har Canaan", against Captain Gray and his employer, G & H Towing Company for the "in rem" liability imposed against the M/V "Har Canaan" by reason of the negligent act of Captain Gray (Conclusion of Law No. 7, R. 897); and held that the so-called "pilotage" clause in the contract between Bay-Houston Towing Co. and Maritime Overseas Corporation did not shift the responsibility for Gray's negligence from Gray and G & H to Maritime Overseas Corporation; that this was in fact a towage operation, not a pilotage operation, and that such release towing agreements and recitations of employer-employee relationships when none in fact existed had been held by this Court to be invalid as against public policy in *William A. Bisso v. Inland Waterways Corporation*, supra. Finally, the District Court concluded that even if the so-called pilotage clause were not void under the *Bisso* decision, and even if it were sufficiently broad to afford to G & H Towing Co. a basis for indemnity against Maritime Overseas Corporation (which it was held not to be, R. 873), that it would furnish no protection whatever to Gray because he was not a party to the contract, and it was not made for his benefit (R. 873).

The Fifth Circuit Court of Appeals affirmed the holding of the trial court that the negligence of Captain Gray alone

was responsible for the damages in the case, and that Maritime Overseas Corporation, whose vessel, the M/V "Har Canaan", was held liable in rem solely because of the negligence of Captain Gray, was entitled to indemnity against the said Captain Gray and against his employer, G & H Towing Company for the in rem liability imposed against the ship by reason of Gray's negligence. The Court of Appeals specifically approved the District Court's holding that the so-called pilotage clause was inapplicable and as a defense was invalid, and did not suffice to impose liability against Maritime Overseas Corporation for the negligence of Captain Gray, because this was, under the proven facts, a towage situation, not a pilotage situation, and the exculpatory clause, being an attempt to release a towing company from liability for its own negligence, was void as against public policy under the holding of this Court in *William A. Bisso v. Inland Waterways Corporation*, supra. (Please see the opinion of the Court of Appeals at 287 F. 2d 852.)

Lastly, the Court of Appeals (287 F. 2d 852, at P. 854) affirmed the holding of the District Court that even if the so-called pilotage clause were otherwise regarded as valid, it would not protect Gray from liability for his own fault.

Reasons For Not Granting The Writ

Your Honors should refuse to grant a writ of certiorari in this cause for the following reasons:

1. There was no error in the decisions of the District Court and the Court of Appeals.

2. The opinion of the Court of Appeals is not in conflict with that of any other Court of Appeals or with this Court in any other case.

3. No public interest of importance is here involved.

4. Inasmuch as the opinions of the District Court and the Court of Appeals were the result of the application of settled legal principles to fact findings initially made by the District Court on ample evidence, which fact findings were approved by the Court of Appeals as not clearly erroneous; there are no questions to be passed on by this Court.

ARGUMENT

I.

There Was No Error in the Decisions of the District Court and the Court of Appeals

A. The District Court and Court of Appeals were correct in applying the rule of the Bisso Case to the facts here found.

Petitioner assails the holdings of the District Court and the Court of Appeals for failing to apply certain authorities upholding pilotage clauses to the case at bar. However, Petitioner fails to recognize, or recognizing, insists on ignoring the fact that *this situation was found, on competent evidence, by the District Judge, to be one of towage, rather than pilotage*, and this finding was specifically approved by the Court of Appeals. Petitioner apparently is contending that since he called himself a "pilot", called the job which he was performing "pilotage", and called the exculpatory clause in the contract a "pilotage" clause, that pilotage authorities should have been applied in the case, in spite of the fact that the ship had no propulsion or maneuvering power and the Court found the facts to be that such pilotage as is mentioned in Petitioner's authorities

was not here involved. It is submitted that the District Court and the Court of Appeals were eminently correct in applying to the facts of this case the holding of this Court in *Bisso v. Inland Waterways Corporation*, supra, and in distinguishing *Sun Oil Co. v. Dalzell Towing Co.* (2 C.C.A. 1932) 55 F. 2d 63, aff'd. 287 U.S. 291, because the former involved *towage*, and thus was a direct precedent, and the latter involved *pilotage* and thus was not in point. We are unable to find a case in American Jurisprudence holding that a so-called pilotage clause, such as the one here involved, was valid and enforceable under the facts here found by the District Judge on the proofs presented.

The flaw in Petitioner's argument could not be more clearly defined than it was in the words of Judge Joseph Hutcheson, speaking for the Fifth Circuit Court of Appeals in its unanimous opinion in this case where he stated in substance that no matter how one looked at the case, nothing more could be made of it than a mere case of a towing service furnished by G & H and performed by its port captain who, though denominated "pilot", was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship. (For the text of Judge Hutcheson's remarks on this subject the Court is referred to Page 4 of this brief where they are quoted in full).

Thus, while it may be true as Petitioner states that it has been held in *Sun Oil Co. v. Dalzell Towing Co.*, supra. and *United States v. Chris Neilson*, 349 U.S. 129, and many other cases that "pilotage" clauses are valid under proper circumstances, it does not follow that a "pilotage" clause will be given effect to enable one party to escape the consequences of his own negligence when it has been

found as a matter of fact on competent evidence that *towage and not pilotage* was involved. The proposition that a tower such as is mentioned in the *Bisso* case may not validly contract against liability for its own negligence has long been a part of the judicially created admiralty law. This rule was first established by this Court in 1871 in *The Steamer Syracuse*, 12 Wall 157, 20 L. Ed. 382. Thereafter, there were some departures from the rule, notably that of the Second Circuit in *The Oceanica*, 170 F. 893, but when the question was next presented to this Court in 1928 in *The Wash Gray*, 277 U.S. 66, this Court emphatically approved the language and holding of *The Syracuse* and repudiated the holding of *The Oceanica*. In 1955, in the *Bisso* case, this Court again considered a release from liability clause in a towage contract. In the *Bisso* case, the Petitioner's barge, while being towed in the Mississippi River by the Respondent's Tug "Cairo", collided with a bridge pier and sank. At the time, the barge had no propulsion power or steering apparatus; her navigation and maneuvers were in complete control of the Tug "Cairo", her master and crew, whose negligence caused the collision. Consequently, Respondent, owner of the Tug "Cairo", would have been liable to pay Petitioner's damages unless relieved of liability by certain clauses in the contract. One of the clauses in question provided that the towing to be performed should be at the sole risk of the tow, and the second clause provided that the masters, crews, and employees of the Tug "Cairo" and her owners should in the performance of the service become and be the servants of the tow. This Court held both clauses invalid and stated that the authorities strongly pointed to the existence of a judicial rule, based on public policy invalidating contracts releasing towers from all liability for their negligence.

It was further stated that the two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. Referring to the fiction of the release clause whereby the tower sought to make his own employees the employees of the tow, this Court stated at Page 95, "The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when the latter 'employment' is purely a fiction."

As clearly illustrated by the *Bisso* opinion, the District Court and the Court of Appeals correctly distinguished the *Sun Oil v. Dalzell* case from the case at bar in the following two vital particulars: (1) in *Sun Oil v. Dalzell*, the ship with her own crew was using her own propulsion and rudder power, thereby retaining control of her own movements, and producing a "pilotage" situation; and (2) in *Sun Oil v. Dalzell*, there was no proof or consideration of a monopoly in favor of the towing company. These two distinctions merit special emphasis here:

> ***Sun Oil v. Dalzell was a true pilotage case, where the ship was using her own propulsion and rudder power, and the towing company, therefore, was merely assisting the ship and did not have complete control of the operation.***

It is, of course, plain from the following language in the *Bisso* opinion (Page 94), that one of the Court's reasons, if not the overriding reason, for invalidating the exculpatory clause in that case was the fact that the vessel

in tow had no propulsion or steering power of her own, or, in other words, that it was a towage case:

> " * * * It is one thing to permit a company to exempt itself from liability for the negligence of a licensed pilot navigating another company's vessel *on that vessel's own power*. That was the Sun Oil case. It is quite a different thing, however, to permit a towing company to exempt itself by contract from all liability for its own employee's negligent towage of a vessel." (Emphasis supplied)

Similarly, in *Sun Oil v. Dalzell*, supra, relied on by Petitioner, this Court in affirming the Court of Appeals which affirmed the District Court which had found that the ship under her own power and maneuverability was being "assisted" by tugs clearly demonstrated that the fact that the Sun Oil vessel *was* using her own propelling power, and was therefore a pilotage case, was a controlling factor in the result. This Court's opinion therein reads in part as follows:

> " * * * It was not shown that Respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to *furnish tugs to assist her while using her own propelling power.*" (Emphasis supplied)

The distinction in the cases lies in the source of control. In *Sun Oil v. Dalzell*, it was found that the ship, having her own propelling and rudder power, retained control of her own movements, and was merely being assisted by the tugs and pilot, and the pilotage clause was held to be valid because it was in fact a pilotage case. In the instant case, it was found as a matter fact on competent evidence (Find-

ing of Fact No. 13, R. 882), that the M/V "Har Canaan" had no propulsion or maneuvering power and that her helm was lashed so that she had no rudder or steering power. As the master of the M/V "Har Canaan" was unable to command the tug (R. 715), and as his ship had no power or maneuverability, neither he nor his crew attempted to, nor could they, nor did they move the ship forward, backward, or to port or starboard. The facts have been found that the entire navigation, maneuvering and movement of the ship was within the complete control of the towing company through its tugs and its regular employee, Captain Emmett Gray, who, as previously pointed out, were exercising actual control of the navigation and maneuvering at the time of the accident, and who remained the servants of the towing company throughout the entire operation. These facts are clearly distinguishable from those in the *Sun Oil v. Dalzell* case, and all others cited by Petitioner, where the ship was using or had available for use her own maneuvering, propulsion and rudder power, and was directing her own maneuvers and navigation and was merely being assisted by the tugs. The facts in the instant case being very closely akin to those in the *Bisso* case, the result was properly held to be governed by the decision therein.

It is of particular significance that all of the cases cited in Petitioner's brief, which uphold pilotage clauses, are cases of true pilotage, where the vessel being assisted was using, or had available for use, her own propulsion and rudder power; indeed, in all of those cases which we have found where litigation over a so-called pilotage clause has arisen, the clause itself has specified that it applied only when the vessel being assisted was using or had available for use her own propulsion power. In the *Niels Finsen*,

(SD NY 1931) 1931 A.M.C. 1014, 52 F. 2d 795, the Court took particular note of this wording in the contract, saying:

> "Does the 'pilotage' change these legal consequences? The purpose of it is, of course, to shield the towing company from liability for the acts of its representative when the latter boards a vessel, *but only, it may be observed, in cases where the vessel is making use of its own propelling power.*" (Emphasis supplied)

The reason for making the distinction between those cases wherein the vessel is making use of her own propulsion and rudder power (pilotage cases) and those wherein she has no propulsion or rudder power (towage cases) is clearly supported by sound public policy; in the one case she has the capacity to extricate herself from situations of peril; in the other case, (as the one at bar), the fate of the vessel in tow is entirely within the control of the towing company through its tugs, their crews, and its so-called dead ship pilot, all of whom are its employees.

The rule of *Sun Oil v. Dalzell,* and similar cases, should be strictly confined to the particular fact situation there involved, as it upholds an exculpatory clause which, historically, are strictly construed by the Courts.

In Sun Oil v. Dalzell there was no proof of the existence of a monopoly in favor of the towing company.

Sun Oil v. Dalzell, as heretofore stated, is distinguishable from the *Bisso* case, and from the instant case by the fact that in the former there was no monopoly involved, whereas in the instant case, as in the *Bisso* case, it was definitely proven that the towing company enjoyed a

monopoly. In commenting upon the absence of a monopoly in *Sun Oil v. Dalzell,* this Court said:

> "Respondents had no exclusive privilege or monopoly in respect to the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept any terms of Respondents' pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

Evidently, therefore, this Court left open the validity of the clauses in cases where the parties are not on an equal footing or capable of dealing at arm's length. *Sun Oil v. Dalzell* was decided some 23 years prior to the *Bisso* case, and in the latter, when confronted with an exculpatory clause, this Court specifically struck it down as being against public policy, and expressly stated as one of the reasons for the decision that it was "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." Mr. Justice Douglas, in his concurring opinion (Page 96) in the *Bisso* case, emphasized the point by quoting with approval the words of Judge Coxe in *The Oceanica, supra,* as follows:

> "It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness, and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. *In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precaution to preserve it.*" (Emphasis supplied)

And again, Mr. Justice Black, speaking for the majority in the *Bisso* case, (Page 91) said:

> " * * * And increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions."

The Trial Court (Finding of Fact No. 10, R. 880) found the following facts with respect to the status of G & H Towing Co., all of which were clearly supported by the evidence: That the only towing companies offering tug service for shifting ocean going vessels in the Port of Galveston at the time in question were Bay-Houston Towing Company, Sudeman & Young Towing Company, and Intracoastal Towing & Transportation Company; that the services which were available to the owners and operators of ocean going vessels in the Port of Galveston from the three "owning companies" were identical; that this came about in that the three "owning companies" did not operate their own tugs, but all three chartered, bareboat, their tugs to G & H Towing Co., an operating company, which was jointly owned by the three "owning companies"; that in carrying out the orders for towing service, G & H Towing Company would use the tugs which were most readily available and convenient without regard to the ownership, and regardless of which of the three "owning companies" may have had the contract with the vessel to be towed; that the contracts between the "owning companies" and the vessels (or their owners or charterers) expressly allowed for performance in this manner; that the contracts offered by the three "owning companies" were identical in terms, and upon a

single printed form; that the rates were the same, save for an exclusive contract a ten percent reduction was allowed.

The evidence showed and it was found that any so-called competition between the three "owning companies" in the port of Galveston was purely a fiction. The only towing services available in the Port of Galveston were offered by G & H Towing Co., and they involved the same boats, the same rates, the same crews, the same so-called dead ship pilot, and the same contractual conditions (R. 792, 793, 794, 796, 801, 802). It was, therefore, crystal clear that the three "owning companies" and their wholly owned operating company, G & H Towing Co., effectively monopolized the harbor towing business in the Port of Galveston, and that Maritime Overseas Corporation had no freedom to choose a type of contract without such exculpatory provisions. This was the exact situation which this Court in the *Bisso* case was endeavoring to guard against. The steamship companies regularly doing business in the Port of Galveston were required either to submit to this monopoly, and the harsh terms and conditions it exacted, or do without harbor towing services. The latter they could not do, and the former the District Court, with the subsequent approval of the Court of Appeals, correctly held the prevailing authorities did not compel them to do.

The dropping of an anchor by a vessel without power and maneuverability is not pilotage.

Petitioner attempts here, as it did in the District Court and the Court of Appeals, to distinguish this case from the *Bisso* case by making the contention that the negligent act here was one of pilotage rather than towage. It is, of course, clear that the validity of the exculpatory clause here involved cannot depend upon the nature of the par-

ticular negligent act resulting in the damages, but must depend solely upon the general nature of the overall operation. In this instance, the Court has finally determined, on ample evidence, that the case was one of towage and therefore, any act of negligence committed by any employee of the towing company necessarily was one committed in the course of the towage operation. Moreover, reason does not support the contention that the dropping of an anchor is an act of pilotage rather than towage; barges and non-self propelled vessels which are normally towed in American waters today are equipped with anchors available for use, and certainly there is nothing unusual about a tow being anchored during the course of a towage operation. Anchoring a tow does not change its status as a towed vessel. The mere fact that the anchor was on the tow itself, which in many instances is a requisite to seaworthiness, does not make it any less a part of the overall towing job. The important factor in distinguishing between towage and pilotage is that of the location of control: in the former the tow has no propulsion or rudder power, and her entire navigation and management are under the control of the towing company through the latter's employees; in a pilotage situation the vessel has the use of her own propulsion power and steering gear, thereby retaining control of her own movement, and the towing company merely assists that movement.

Petitioner makes the contention that Maritime Overseas Corp. was not required to sign the contract containing the exculpatory clause in order to obtain tug service in the port of Galveston, Texas. We feel that the findings of the Court on competent evidence against this contention has put it at rest, it having found that Maritime Overseas

Corp. had no freedom of choice in the type of towing contract offered, but was required to accept a contract with such exculpatory provisions if in fact it was to secure the tugs to move its ship (Conclusions of Law, R. 886). This finding was based upon well supported evidence (R. 793). Whether a ten percent reduction was allowed in the rate or not (for signing an exclusive contract), any contract under which G & H Towing Co. furnished tugs to move a vessel contained the same exculpatory provision, and no other contract was available because G & H Towing Co. had a monopoly of the harbor towing business in the Port of Galveston.

Summary of the Applicability of the Bisso Rule, and the Reasons for Distinguishing Sun Oil v. Dalzell.

In summarizing the reasons for applying the rule of the *Bisso* case to the facts found in the case at bar, and distinguishing *Sun Oil v. Dalzell*, and related opinions, we cannot improve upon the words of the District Judge found in his Conclusions of Law (R. 885, 886), where he said:

> "In considering the question of liability over between the various respondents, however, the validity of the so-called 'pilotage clause' (Finding No. 11) is placed at issue.
>
> Maritime Overseas contends such provision is void, as contrary to public policy, relying primarily on *Bisso vs. Inland Waterways Corp.*, 349 U.S. 85, and related opinions immediately following. Respondents G & H Towing and Captain Gray in supporting the

validity of the exculpatory provisions rely primarily on *Sun Oil Co. v. Dalzell Co., Inc.*, 287 U.S. 291.

Under the facts found above, in my judgment, *Bisso* is controlling, by reason of the following circumstances, which I consider to have been stressed by the Court; (a) the vessel was being moved entirely under the power of the furnished tugs, and without power or control of her own; and (b) by reason of the monopolistic situation which prevailed in the vicinity of Galveston harbor whereby a vessel had no freedom of choice in the type of towing contract offered, but must accept a contract with such exculpatory provisions if in fact it was to secure the assistance of tugs in its movement. Here, as in *Bisso*, the vessel was under complete control of Captain Gray, as an employee of the towing company, and such towing company did 'have power to drive hard bargains'.

The instant case is distinguished from *Dalzell* in these same particulars, for there the Court points out (a) 'it was not shown that Respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power.'; and (b) 'Respondent had no exclusive privilege or monopoly in respect to the service that Petitioner desired to have performed for its tanker. . . . There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

It is, therefore, respectfully submitted that the decisions of the District Court and Court of Appeals, holding under the facts of this case that the so-called pilotage clause did not exculpate Petitioners, are entirely in accord with the settled American maritime law governing in circumstances such as these.

B. Even if the so-called Pilotage Clause were valid, it would not preclude the award of indemnity to Maritime Overseas Corporation against Emmett Gray for the in rem liability imposed against the M/V "Har Canaan" by reason of Gray's negligence, because Gray was not a party to the contract, and it was not made for his benefit.

The District Court held that since Petitioner, Captain Gray, was not a party to the contract in which the alleged exculpatory clause appeared, and since the contract was not made for his benefit, it did not preclude an award of indemnity to Maritime Overseas Corporation against Captain Gray for the in rem liability imposed against the M/V "Har Canaan" solely by reason of Gray's negligence. (R. 873). The Court of Appeals specifically affirmed this holding, saying (287 F. 2d 852, at P. 854):

> "We are also of the opinion that there is no merit whatsoever in Gray's claim that he is protected from liability for his own fault by the terms of the contract, even if it were otherwise regarded as valid."

Nevertheless, the Petitioner, Emmett Gray, now makes the entirely specious contention that the so-called pilotage clause (which purports to make the said Emmett Gray an employee of Maritime Overseas Corporation) was binding upon Maritime Overseas Corporation so as to render the latter personally liable for damage to the pipeline due to his (Gray's) negligence, but that he (Gray) is nevertheless entitled to the purported protection of the same clause insofar as it states that certain named beneficiaries therein will not be liable for damages by the so-called dead ship pilot. In other words, Gray says that by virtue of the so-

called pilotage clause, he was an employee of Maritime Overseas Corporation, but that since he was not in fact an employee of Maritime Overseas Corporation, he was entitled to the protection the said clause purportedly afforded. This argument obviously has no foundation in law or justice. Assuming, arguendo, that the so-called pilotage clause were valid, then Gray would be the employee of Maritime Overseas Corporation, and would not be entitled to any so-called exemption as an employee of G & H Towing Co. On the other hand, if the clause were invalid (as the courts below have properly held it to be), then Gray would still be an employee of G & H Towing Co., and no protection would be afforded to him or to his employer, G & H. Whether Gray was an employee of Maritime Overseas Corporation, or of G & H Towing Co., he was personally liable to Maritime Overseas Corporation as the sole wrongdoer. Just as Maritime Overseas Corporation could have a recovery for indemnity against its own master if his negligence had been found to be the sole cause of the damages, it could have the identical recovery against Gray whether Gray were held to be its employee or not. Moreover, Gray did not qualify as one of the named beneficiaries within the wording of the so-called pilotage clause, i.e., he was not one of the "tugs or their owners, agents, masters, servants, employees or charterers".

It is fundamental law that one seeking to take advantage of a contract made for his benefit by another must take it subject to all of its terms and conditions. See 17 *C. J. S.*, Contracts, Section 529; *Pennsylvania Cement Co. v. Bradley Contracting Co.* (2 CCA 1925), 7 F. 2d 822; *Burke v. Scott* (CCA Texas 1951) 237 S.W. 2d 655. Thus, if Petitioner, Emmett Gray, asked for the purported pro-

tection of the so-called pilotage clause, he would also be bound by that part of the same clause purporting to make him an employee of Maritime Overseas Corporation; if he were an employee of Maritime Overseas Corporation, then obviously he could not at the same time be an employee of G & H Towing Co. or a beneficiary under the contract. Even in those cases where a pilotage clause has been held to be valid, that is, those of true pilotage, in which the ship was using her own propulsion power and rudder, and remained in the control of her own master and crew, and the parties had dealt at arm's length, indemnity has been awarded to the shipowner against the pilot for all sums for which the shipowner had been required to indemnify the towing company. See *"Gypsum Queen"—Tug "Peerless"* (E.D. Va.) 1953 A.M.C. 2071 (no other citation available); *People of the State of California v. The Steamship "Jules Fribourg"* (N.D. Cal.) 1956 A.M.C. 939, 140 F. Supp. 333.

C. The District Court and the Court of Appeals correctly awarded indemnity to Maritime Overseas Corporation against Captain Emmett Gray for the in rem liability imposed against the M/V "Har Canaan" solely by reason of Gray's negligence.

In his petition, Argument, Article III, Emmett Gray makes several statements of fact which are not supported by the record, and which in fact are directly contrary to the findings of the District Court made on competent evidence and approved by the Court of Appeals. It is not true, as Petitioner states, that the M/V "Har Canaan" was being commanded by her master during the entire

time of her towing operation; that the master approved in advance the use of the ship's anchor; that Emmett Gray was acting only in an advisory capacity; or that the master, and not Emmett Gray, ordered the anchor dropped. The true facts, as found by the District Court, and approved by the Court of Appeals, are that Petitioner, Captain Emmett Gray, not the master, was conning the ship throughout this entire operation (Finding of Fact No. 13, R. 882). Although the Master of the M/V "Har Canaan" was on her bridge, he was not commanding the ship as the ship did not have the use of her own propulsion or rudder power and was being moved solely by the tugs, which the master was unable to, and did not command. (R. 715). Captain Gray simply went aboard the ship and advised the master that the anchor would be used when the ship was docked, and to have it ready (Finding of Fact No. 13, R. 882, and see also R. 670). Captain Gray was directing the entire movement, and was not acting in any advisory capacity; it was Gray, not the master, who gave the order to drop the ship's anchor, as found by the District Court in no less than four separate fact findings (Findings of Fact No. 17, 18, and 21, R. 883, 884).

Petitioner states that the Court of Appeals' decision is based upon a holding that Petitioner was not a compulsorily employed pilot, and that Petitioner was a pilot voluntarily engaged for the convenience of the ship. Neither of these statements is supported by the record. A reading of the opinion clearly shows that the Court of Appeals' decision is not based upon the fact that Petitioner was not a *compulsory* pilot, but that *he was not a pilot at all.* This is plain from the language used by Judge Hutcheson at page 854 of the Court of Appeals' opinion, where, refer-

ring to the status of Captain Gray, he stated that although Gray was denominated a "pilot", he was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship. Moreover, Captain Gray was not voluntarily engaged for the convenience of the M/V "Har Canaan". As a matter of fact, no request was made by Maritime Overseas Corporation for Gray's services, and he was completely unknown to Maritime Overseas Corporation until he boarded the ship to take charge of the towing operation. Captain Gray was not employed as a pilot by Maritime Overseas Corporation, and the latter exercised no control over his actions. Neither was any pilotage fee paid to Gray by Maritime Overseas Corporation. Gray was furnished automatically by G & H Towing Co., for its own convenience, and on its own initiative, whenever it received any request to move a dead ship. (R. 726). Inasmuch as G & H Towing Co. had a monopoly of the harbor towing business in the Port of Galveston (Finding of Fact No. 10, R. 880 and Conclusions of Law, R. 886), Maritime Overseas Corporation was obliged to accept Captain Gray along with the tugs furnished by G & H Towing Co.

Since the District Court found, on competent evidence, that the damage to the pipeline was caused solely by the negligence of Captain Gray, as an employee of G & H Towing Co., that the master of the M/V "Har Canaan" was not negligent in failing to intervene or displace Captain Gray, (Finding of Fact No. 21, R. 884), and that neither the master nor any member of the crew of the M/V "Har Canaan" was negligent in any particular (Finding of Fact No. 22, R. 884), and these findings were approved by the Court of Appeals, it is clear that Maritime Overseas Corporation could not have been held per-

sonally liable. Petitioner's contention now made that Respondent was a joint tort feasor through the negligence of the master is foreclosed. All of those cases which Petitioner cites in his brief have to do with independent state licensed pilots voluntarily employed and paid for by vessels having the use of their own propulsion and rudder power and under the direct control of their own crews. They are not cases, such as the one at bar, of towage, where the ship, without power, self propulsion, rudder, or self maneuverability was being navigated and maneuvered dead, entirely under the control of a towing company through its tugs and through its employee furnished to direct the towing operation. Accordingly, such cases cited by Petitioner are not in point.

Although the courts below have declined to hold Maritime Overseas Corporation personally liable for the damages to the pipeline because there was no negligence upon the part of the master or crew of the M/V "Har Canaan" the Courts have imposed in rem liability against the M/V "Har Canaan" solely by reason of the negligence of Captain Gray who was directing the movement of the vessel. While the District Court and Court of Appeals have held that the in rem liability of the M/V "Har Canaan" was joint and several with that of Captain Gray and his employer, G & H Towing Co., they have not held that Maritime Overseas Corporation, claimant of the M/V "Har Canaan", was a joint tort feasor, and correctly so. Petitioner, Gray, cites *Halcyon Lines v. Haenn Ship Sealing & Refitting Corp.*, 342 U.S. 282, presumably as authority for the contention that the courts below erred in granting to Maritime Overseas Corporation indemnity against Petitioner. The *Halcyon* case holds, at most, that there is no

contribution between joint tort feasors in admiralty in non-collision cases. Thus, in citing the *Halcyon* case, Petitioner makes three erroneous assumptions: first that this case involves joint tort feasors, second, that it involves contribution, and lastly, that it is not a collision case. A joint tort feasor situation does not arise unless the Court finds concurrent negligence of two or more persons combined resulting in an injury to a third person, and in that event, those persons concurrently negligent are jointly and severally liable, and the injured person may recover from either or all. 65 *C.J.S.* Negligence, Section 102, page 639. In the instant case, the Courts below have specifically found on competent evidence that the master and the members of the crew of the M/V "Har Canaan" were not negligent, and have held that Maritime Overseas Corporation, claimant of the M/V "Har Canaan", was not personally liable. The liability of the M/V "Har Canaan", in rem, therefore, was predicated solely upon the negligent act of Captain Emmett Gray, an employee of G & H Towing Co., and not upon any negligence of anyone for whom Maritime Overseas Corporation was personally responsible. The simple holding that the vessel was jointly liable in rem is not tantamount to a holding that the vessel or its claimant was a joint tort feasor, or committed acts of concurrent negligence, nor could any such contention be seriously made. Inasmuch as the *Halcyon* decision involved *joint tort feasors and contribution*, not *joint liability and indemnity* (as does the instant case), the *Halcyon* case is clearly distinguishable.

There have been numerous cases since the *Halcyon* decision which have allowed indemnity to one of two parties held to have been jointly and severally liable on either

or both of two bases: First, on the basis of the breach of an implied contractual obligation or warranty by the person who undertakes or agrees to do a job (as G & H Towing Co. agreed here to shift Maritime Overseas Corporation's ship) that he will do the job or perform the service in a reasonably safe manner and/or in such a manner as not to cause injury or damage to third parties; and second, on the basis that one party held to be jointly and severally liable with another was guilty of only secondary or passive tortious conduct, whereas the other party was guilty of primary or active tortious conduct. Neither of these two situations involves joint tort feasors, but only joint liability. Maritime Overseas Corporation, under the facts of the case at bar as found by the District Court on competent evidence, qualifies for indemnity under either category. See *Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation*, 350 U.S. 124; *States S. S. Co. v. Rothschild International Stevedoring Co.* (9 C.C.A. 1953), 205 F. 2d 253 (where Halcyon was distinguished); *Brown v. American Hawaiian S. S. Co.* (3 C.C.A. 1953) 211 F. 2d 16; *Horan v. Pope & Talbot* (E. D. Pa.), 1953 A.M.C. 2157, 115 F. Supp. 32; and *Davis & Mattison v. Am. Pres. Lines* (N.D. Cal.), 1952 A.M.C. 818, 106 F. Supp. 729.

How could it be seriously argued, that if indemnity is allowable between active and passive tort feasors, it would not be allowed to litigants such as Maritime Overseas Corporation in the instant case, who was found, on sufficient evidence, not to have been guilty of any negligence, whose only liability, which is in rem, is one created by operation of law solely through the negligent act of another, because it owned the ship and thus it is not a tort feasor at all, but merely jointly liable?

Finally, it is respectfully submitted that Petitioner, Emmett Gray, has inferentially admitted in his petition that contribution and/or indemnity is allowed in collision cases. By arguing along the lines of the *Halcyon* case, Petitioner apparently assumes that this is not a collision case. However, it is respectfully submitted that this is a collision case, and in all respects governed by collision principles. We cannot perceive any difference between this case, where an anchor, an integral part of the ship, struck a fixed pipeline, and those cases where a ship, or some part thereof (a gangway, for instance), strikes a bridge, a pier, a jetty or some other structure affixed to the land. Admiralty has had jurisdiction of these controversies since 1948 under 46 U.S. C.A., Section 740, and they have been uniformly treated as collision cases, which they are, and all admiralty principles such as those of statutory fault, divided damages, etc. uniformly applied to them by the Courts. It is, accordingly, clear that the District Court and the Court of Appeals were correct in awarding indemnity to Maritime Overseas Corporation against Petitioner, Emmett Gray, for the in rem liability imposed against the M/V "Har Canaan" by reason of Gray's negligent act.

II.

The Opinion of the Court of Appeals is not in Conflict With that of Any Other Court of Appeals or of this Court in Any Other Case.

Clearly, the opinion of the Court of Appeals in this case is entirely in conformity with the prevailing law as announced by Your Honors in *Bisso v. Inland Waterways Corp.*, the case having been determined on competent evidence as a matter of fact to be one involving towage.

The decision is not in conflict with that in *Sun Oil Co. v. Dalzell,* or the cases following it, because those cases involve, as a matter of fact, pilots on vessels being assisted while under their own propulsion power and maneuverability, and not towage. Indeed, there is a marked uniformity in the authorities throughout the country whereby an exculpatory clause, that is a clause purporting to release a party from liability for damages for its own negligence, is held to be invalid as against public policy when towage is involved. This case, having been determined to be one of towage, falls under that line of authority in which the exculpatory clause is held invalid.

However, if this Court should believe that there are facts present in this case which render it substantially distinguishable from the *Bisso* case, and yet do not bring it within the purview of the rule announced in *Sun Oil v. Dalzell,* then it is respectfully submitted that it would be a novel case, and that the law governing in such situations has been determined by the Fifth Circuit Court of Appeals by its opinion in this case. That opinion, in view of its novelty, would not be in conflict with any other decision of any other Circuit Court of Appeals or of this Court. Accordingly, for this reason, the writ should be refused.

III.

No Public Interest of Importance is here Involved.

Petitioner is endeavoring to have a clause, sometimes held exculpatory in true *pilotage* situations, declared to be effective to relieve a towing company for negligent *towage.* We have been unable to find a case where this was done and Petitioner has cited none. Indeed, in almost all cases

now on record, where litigation involving such a pilotage clause has arisen, the clause itself has provided that it is effective when the vessel being assisted had the use of her own propulsion power, or in other words, what we refer to as pilotage cases. Certainly the clause here asserted by Petitioner to be involved is not in wide use, if indeed it is in use in any port except Galveston, Texas. The circumstances that the engines and rudder of the "Har Canaan" were inoperative, combined with the occurrence of a rather freakish accident (the breaking of a poorly marked submarine pipeline by a ship's anchor), occurring in a harbor where a monopoly of harbor towing business existed in favor of a single towing company, gave rise to the issues of cross-liabilities and indemnity in this litigation. The unusual circumstances which gave rise to these issues are not likely to occur with frequency, and would concern only a small segment of the marine industry in isolated instances. Certainly there are no issues here involved which would be of importance to the general American public.

IV.

Inasmuch as the opinions of the District Court and the Court of Appeals were the result of the application of settled legal principles to fact findings amply supported by the evidence, and not clearly erroneous, there are no questions to be passed on by this Court.

The law is clear that on a question of fact this Court will accept the concurrent findings of the District Court and Circuit Court of Appeals supported by substantial evidence. *The "Linseed King"* (N.Y. 1932), 285 U.S. 504; *Graver Tank and Mfg. Co. v. Linde Air Products Co.*,

(Ind. 1959) 336 U.S. 271; *Alabama Power Co. v. Ickes* (1938) 302 U.S. 464.

At the risk of being burdensomely repetitious, it is again respectfully pointed out to the Court that the District Court, on well supporting evidence, found, as a matter of fact, that the situation here involved was one of towage, rather than pilotage, and that the exculpatory clause was inapplicable under the facts as they found them. These fact findings were specifically approved by the Court of Appeals. The District Court applied the well settled law, as announced by Your Honors in *Bisso v. Inland Waterways Corp.*, supra, that a tower cannot effectively release himself from liability for negligence of his own employees. The Court of Appeals approved the fact findings and this application of the settled law. This effectively disposes of, and indeed precludes, under the authorities cited above, any further consideration by this Court of the points which Petitioner attempts to raise in this petition.

Conclusion

Maritime Oveaseas Corporation respectfully submits that the judgment of the Court of Appeals, and the judgment of The District Court, are correct; that their holdings are not in conflict with, nor are they in any way contrary to, any prior decision of other Courts of Appeal or of this Court, but are in conformity with such decisions; that the decisions of the District Court and of the Court of Appeals in this case are the result of the application of well settled legal principles to findings of fact amply supported by the evidence; that the case involves no matters of general public interest of importance, and that the decisions are not contrary to any precedents or public interest that

require their correction by the exercise of this Court's power of supervision.

Respectfully submitted,

EASTHAM, WATSON,
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Certificate

I certify that a copy of the foregoing Brief of Maritime Overseas Corporation in opposition to the Petition for Writ of Certiorari of Emmett Gray, has been mailed to Mr. Robert Eikel, 1910 Tennessee Building, Houston 2, Texas, Attorney for Petitioner, G & H Towing Company and Petitioner, Emmett Gray, Royston, Rayzor & Cook, Cotton Exchange Building, Galveston, Texas, Attorneys for Petitioner, G & H Towing Company, and to McLeod, Mills, Shirley & Alexander, 801 Santa Fe Building, Galveston, Texas, Attorneys for Respondents, Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corp., and Pelican Island Development Corporation, this 28th day of August, 1961.

CLARENCE S. EASTHAM

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NO. 276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

EMMETT GRAY, *Petitioner*

-versus-

EDWIN L. JOHANSSON, KANSAS CITY BRIDGE CO., MERRITT-CHAPMAN & SCOTT CORP., AND PELICAN ISLAND DEVELOPMENT CORP., AND MARITIME OVERSEAS CORPORATION,

Respondents

PETITION FOR REHEARING

Of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

To The Honorable The Chief Justice and Associate Justices of The Supreme Court of the United States:

Emmett Gray, petitioner herein, respectfully petitions this Honorable Court for a rehearing herein of the order of this Honorable Court entered herein on October 9, 1961, denying his petition for a writ of certiorari to issue

to review the judgment of the United States Court of Appeals for the Fifth Circuit, and would respectfully show that there exist intervening circumstances of substantial effect and other substantial grounds not previously presented, as follows:

GROUNDS FOR ALLOWING REHEARING AND GRANT OF PETITION

1.

Since the decision by the Court of Appeals of this case and the filing of the petition for writ of certiorari, the District Court for the Southern District of New York on March 16, 1961, has decided the case of *International Terminal Operating Co., Inc. v. Naviera Azuar S. A., et al.*, 1961 *American Maritime Cases* 1758, not yet reported elsewhere, which affirms once more the validity in the Second Circuit of the exculpatory pilotage clause provisions of a harbor towing contract such as are embodied in the towing contract in this instant case, and petitioner's right to indemnity, vividly demonstrating once again that the decisions below denying validity of the exculpatory clause are in direct conflict with the rule of law followed in the Second Circuit, which was recognized and not repudiated by Your Honors in *United States v. Chris Nielson*, 349 U.S. 179, and in all other American jurisdictions where it has been before the courts as well as in England, and showing the plain injustice of holding petitioner Gray personally liable for very large sums.

2.

There can be no doubt that under the undisputed evidence in this case and giving effect to other holdings of the decisions below that petitioner Gray was the servant

or agent of his master Bay-Houston Towing Company while aboard the vessel directing the towing operation, and hence fully exculpated from liability to and entitled to indemnity from the vessel and respondent Maritime Overseas Corporation as a third-party beneficiary of the contract between Bay-Houston Towing Company and Maritime Overseas Corporation.

STATEMENT

Bay-Houston Towing Company made a written contract with respondent Maritime Overseas Corporation to furnish in certain named Texas ports all harbor tug service it would require, and at Galveston-Texas City to furnish pilotage for shifting vessels not having their own power. An exact copy of the entire contract, except for signatures, is reproduced as Appendix IV below. The exculpatory pilotage clause is as follows:

> Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting from any act, omission or order of said pilot.

The M/V HAR CANAAN, operated by repondent Maritime Overseas Corporation, did not have the use of

her engines, and her agents desired that she be shifted within the confines of Galveston harbor. To perform its contractual undertaking and in strict conformity with the contract above referred to, Bay-Houston Towing Company caused the ship to be shifted by three tugs, one of which it itself owned and the other two being owned by another company, and it also furnished to the ship a "dead-ship" pilot, petitioner Emmett Gray. For all of these services Bay-Houston Towing Company rendered its bills to respondent Maritime Overseas Corporation and was paid in accordance with the contract. The amounts so billed and paid of course included tug hire and pilotage charges, which were billed separately.

In the harbor movement of the ship so performed in accordance with the Bay-Houston Towing Company contract, the M/V HAR CANAAN's anchor was dropped on and damaged a pipe line, and the trial court found the damage caused by petitioner Gray's negligence.

The tugs so furnished to the ship under the contract with Bay-Houston Towing Company were actually operated by a separate and distinct corporation, G. & H. Towing Company, which chartered the tugs from their owners and manned and operated them. Petitioner was in the general employment of G. & H. Towing Company as its Galveston port captain, and he was licensed under the laws of the United States (not under Texas laws) as a pilot for the waters of Galveston harbor. As its port captain he acted in Galveston harbor waters upon request as dead-ship pilot of oceangoing vessels, for at the time the state-licensed Galveston bar pilots did not perform such pilotage.

G. & H. Towing Company had no contractual relations of any kind with Maritime Overseas Corporation. Its

contractual relations and agreements were *only* with Bay-Houston Towing Company (as well as with two other separate and independent tug-owning corporations). If any request was made to petitioner's employer G. & H. Towing Company for someone to act as dead-ship pilot, petitioner Gray was sent. For his services he was paid part of the amount charged for such pilotage, over and above his regular salary.

Under its agreements with Bay-Houston Towing Company, G. & H. Towing Company was paid by Bay-Houston Towing Company (*not* by Maritime Overseas Corporation, to whom it rendered no bills nor presented any claims and of course with whom it had no agreements) a percentage of the amounts (including the amount paid for pilotage) contracted to be and actually paid to Bay-Houston Towing Company by respondent Maritime Overseas Corporation. Out of the portion paid to it by Bay-Houston Towing Company for the pilot's services, G. & H. Towing Company paid petitioner a percentage.

The libel *in personam* against Bay-Houston Towing Company was dismissed by the trial court, and no appeal from that decree taken. All claims against the tugs *in rem* were dismissed, and neither G. & H. Towing Company as operator of the tugs, nor Bay-Houston Towing Company, nor Suderman & Young Towing Company (the owner of two of the tugs) was held liable. No appeal was taken from these portions of the decree.

Petitioner Gray was held personally liable and G. & H. Towing Company was held liable as his principal, by the trial court. The trial court decides that "Gray was acting within the scope and course of his employment by *G. & H. Towing Company* and was not a loaned servant *to the vessel or her operators*." The Court of Appeals par-

ticularly states that petitioner Gray "was merely the person in direct command with respect to a dead ship towing operation," that this "is a mere case of towing service *furnished by G. & H. Towing Company* and performed by its port captain." (Italics ours.)

The decisions below therefore clearly find petitioner Gray an agent, servant, or employee while aboard the vessel, even though the servant of his general employer, G. & H. Towing Company. The exculpatory pilotage clause quoted above consequently completely protects petitioner Gray but for the further holding that the pilotage clause is invalid and void in Galveston harbor. Directly contrary to the numerous holdings by the courts of the Second Circuit that such a pilotage clause requires the vessel to indemnify the towing tugs and their agents, holdings now affirmed as still the law by the recent decision of the New York District Court in *International Terminal Operating Co., Inc. v. Naviera Aznar S. A., et al.*, 1961 A.M.C. 1758, the courts below have held petitioner liable to indemnify the vessel.

ARGUMENT

Petitioner is Covered by the Piltotage Clause

Since both Courts below have held petitioner the servant of the towing company, even though that company is found to have been, erroneously it is submitted, G. & H. Towing Company and not Bay-Houston Towing Company, it is established by these holdings that petitioner is an agent or servant of the towing company. Whether he be called the pilot, as he is so denominated by the trial court, or simply an employee in charge of a towing operation, as he is termed by the Court of Appeals (which is really equally a designation of any pilot aboard a vessel assisted by tugs) he

nevertheless is thus held to be a servant or agent of the employer performing the towing operation.

Hence there can be no doubt if effect be given to these findings that petitioner is covered by the exculpatory pilotage clause provisions, whether the towing company be the charterer, G. & H. Towing Company, or the tug owner (and contracting towing company, as will be shown below) Bay-Houston Towing Company, for the pilotage clause *expressly frees the agents and employees and servants of the tugs or their owners or charterers of any responsibility or liability in the manner or method of handling the vessel*, the dropping of the anchor has been found to be an incident of the handling of the vessel (dismissal of the claims against the tugs is alone sufficient to show this to be the holdings below), and the courts below have found petitioner the servant of the towing company.

(It is respectfully submitted that the courts below are in clear error in holding petitioner's employer while aboard the vessel his general employer G. & H. Towing Company. The evidence is ample and undisputed that Bay-Houston Towing Company contracted and agreed with Maritime Overseas Corporation to furnish tug power and dead-ship pilotage, that is to say, using the language of the Court of Appeals, it agreed to perform the towing operation of shifting the dead ship within the harbor, and it, *not* G. & H. Towing Company, furnished to the vessel here the towing service performed by petitioner Gray and the tugs.)

But whether the servant of one towing company or the other while aboard the vessel, by the express language of the pilotage clause petitioner was freed from responsibility and liability for his handling of the vessel because undeniably he was an agent or employee of the tug owner or charterer.

Holding Petitioner Liable Over to Maritime Overseas Corporation is Clearly Wrong

The holdings of the courts below are clearly erroneous in making no distinction between the rights of petitioner Gray and those of the tugs and towing companies: He is held personally responsible, for damages claimed to approximate $300,000.00, and it is respectfully submitted that his rights can with justice only be considered separately and apart from the rights of the other respondents, looking at petitioner as an individual.

If such separate examination be carefully given to petitioner's rights, it is submitted the decisions of the courts below are plainly erroneous, for they reject the contractual agreement between Bay-Houston Towing Company and Maritime Overseas Corporation and do so without regard to the resulting effect on the rights of petitioner, and contrary to his clear right as a third-party beneficiary of the contract.

Petitioner respectfully submits he is by the agreement a third-party beneficiary of the contract between Bay-Houston Towing Company and Maritime Overseas Corporation and that it is manifestly unjust and contrary to the decided cases to permit Maritime Overseas Corporation to repudiate the agreement it made *after* the occurrence of the events which made applicable to petitioner its exculpatory provisions. Please see the *Restatement of Contracts*, Vol. 1, Sec. 143, Comment a., p. 170, where the governing doctrine is stated to be:

> "a. The beneficiary is justified in relying on the promise and it is immaterial whether he learns of it from the promisor, the promisee or a third party. If there is a material change of position in reliance on the promise, the change of position precludes dis-

> charge or variation of the contract without his consent. It is not necessary that the creditor beneficiary enter into a novation with the promisor, though a novation would *a fortiori* be effectual,"

and *Williston On Contracts,* Rev. Ed., Vol. 2, Sec. 396, p. 1144, where it is said:

> ". . . it has generally been laid down broadly as true of all cases that prior to the assent or acting upon the promise by the third party but not afterwards, a discharge or variation of the promise is operative."

As stated in *Virgin Islands Corporation v. Merwin Lightcrage Co., Inc.*, D.C. Virgin Islands, 1959, 177 F. Supp. 810:

> "It is well settled that contracting parties may, if they intend to do so validly extend a contractual benefit to a third party."

Of course, as Your Honors in *Robert C. Heard & Co. v. Krawill Machinery Corp.*, 1959, 359 U.S. 297, at 305, cautioned, such intention must be clearly expressed, but of course here the language of the contract between Bay-Houston Towing Company and respondent Maritime Overseas Corporation clearly relieves petitioner from liability and responsibility to Maritime Overseas Corporation.

And yet petitioner is held not only liable to libellants, the respondent pipe line owners; he is held liable and responsible also to Maritime Overseas Corporation and required to indemnify that respondent! What greater denial of his individual rights as a third-party beneficiary of the contract could there be?

The contract says that *in the handling of the vessel* that "none of" the tugs nor their owners nor agents nor employees "shall be responsible or liable." Yet both courts below have held petitioner a servant or employee and have as such held him not only liable but have with a vengeance held him responsible over to Maritime Overseas Corporation by way of indemnity!

How can it be justly urged that the contract should be completely rejected as to this third-party beneficiary and his status converted from one of *no* liability to one of indemnity, so that the petitioner, who manifestly could never have dreamed of such a result, by following the orders of his employer to pilot the vessel subjected himself to personal liability of such magnitude?

Until this case, the settled law certainly has been otherwise. Your Honors in *United States v. Chris Nielson*, 349 U.S. 129, have expressly said that contracts of pilotage should contain express language to be enforceable as contracts of indemnity, and of course by so holding imply that where the language *is* express such a contract *is* enforceable.

What more express language freeing petitioner from liability to respondent Maritime Overseas Corporation and absolving him from any responsibility to indemnify that respondent could there be than the words " . . . and none of the tugs, or their owners, agents . . . servants, employees . . . shall be responsible or liable for any act . . . or for any claims or damages caused . . ."?

Under normal rules of indemnity followed in other fields of law, apt language of such character gives rise to a right of indemnity of the person so contractually freed.

And of course the case of *International Terminal Operating Co., Inc. v. Naviera Aznar S.A., et al.*, 1961

A.M.C. 1758, expressly holds that such is still the law in cases of harbor towing and pilotage in the Second Circuit.

What possible justice can there be in failing to accord this petitioner the same rights found in other branches of law, and in the maritime law, and geographically in the Second Circuit where the greatest volume of maritime commerce in America moves? (In England now *by statute* his personal liability would be limited to approximately $340.00, one hundred pounds plus the pilotage charge!) And yet in Galveston harbor he is held to have no right to rely upon a solemn contract and held contrary to the agreement liable for hundreds of thousands of dollars!

The Recent New York Harbor Decision Shows How Contrary to the Settled Maritime Law Are the Decisions Here Denying Petitioner the Contract's Protection

It might have been thought from the summary treatment accorded by the courts below of the exemptions from liability agreed to for independent consideration by respondent Maritime Overseas Corporation in the so-called pilotage clause that the decisions of Your Honors in the *Bisso* and the *Nielson* cases (*Bisso v. Inland Waterways Corporation*, 349 U.S. 85, and *United States v. Chris Nielson*, 349 U.S. 129) had completely invalidated pilotage clauses generally and particularly made now ineffectual the former Second Circuit view that such a clause is valid and one of indemnity.

But the decision of the New York District Court, before which come by far the greatest number of maritime law cases and having within its jurisdiction by far the most important American port, decided on March 16, 1961, in *International Terminal Operating Co., Inc. v. Naviera*

Aznar S.A., et al., 1961 A.M.C. 1758, and for convenience reprinted here below as Appendix V, demonstrates that in the view of at least that respected maritime court the rule of the Second Circuit still is that generally speaking the pilotage clause is valid and one of indemnity.

Your Honors are respectfully referred to that decision, and especially the court's reliance upon the principal decisions of the Court of Appeals for the Second Circuit, including the holding that the clause is one of indemnity in the following language at page 1763:

> "With reference to the pilotage clause, the pilot was negligent, certainly with respect to 'the handling of such vessel' and, arguably, with respect to 'the giving of orders' to the tug *Turecamo*. He was also negligent in the use he made of that tug in the undocking procedure. In any event, his faults first mentioned are clearly within the purview of the pilotage clause and therefore operate to preclude indemnity in favor of the shipowner, because by virtue of that clause the pilot was the 'servant' of the shipowner for the purpose of those actions. Cf. *West Eldara*, 1939 A.M.C. 877, 104 F. (2d) 670, 671 (2 Cir., 1939). If the faults of the pilot that are within the scope of the pilotage clause were the only basis for imposing liability upon the towing company that party would be entitled to indemnity from the shipowner in accordance with the terms of the towing contract. That is not the sole basis of the liability of the towing company however; at least the separate fault of the *Turecamo* tug operates to prevent the award of such indemnity."

That this recent decision of the District Court in the Southern District of New York is not ill-considered but states the post-Bisso case view held in the Second Circuit is further established by *Pennsylvania Railroad Company v.*

The Beatrice, S.D. N.Y., 1958, 161 F. Supp. 136, affirmed 2 Cir., 275 F. 2d 209.

The denial of validity by the courts below to the pilotage clause is in conflict with decisions in two other circuits decided since the decision of Your Honors in the *Bisso* and *Nielson* cases. These cases are *States Marine Corporation of Delaware v. Victory Carriers, Inc.*, 9 Cir., 1959, 272 F. 2d 463, and the decision in the District Court of Massachusetts in *The Carrabulle (National Distillers Products Corporation v. Boston Tow Boat Co.)*, 134 F. Supp. 194, 1955 A.M.C. 604 and 1925, where on rehearing the decision of Your Honors in *Bisso v. Inland Waterways* was found not to have the effect given it by the courts below.

Petitioner would respectfully urge also here that in the world's other great maritime nation, England, like exculpatory clauses have for many years been held valid, going even beyond the American cases in granting indemnity from the vessel for the actions of the assisting tugs and the tug owners' servants or agents. Please see *President Van Buren*, (1924), 132 L.T. 253, 16 Aspinall M.L.C. 444.

Of course today with respect to the liability of licensed pilots England has dealt with the matter by statute, making the pilot liable for any negligence *but limiting the liability of the pilot* to approximately one hundred pounds. Your Honors are respectfully referred to the *Pilotage Act*, 1913, v. 23 of *Halsey's Statutes of England*, particularly the following sections:

> *Section 15:* Makes the owner or master of vessel liable for a pilot compulsorily employed just as though he were voluntarily employed.
>
> *Section 17:* (pp. 845-846) Gives pilotage Board authority to regulate pilots and to

(i) "provide, if and so far as it appears to the authority to be generally desired by the pilots, for bonds (the penalty of which shall not in any case exceed one hundred pounds) being given by pilots for the purpose of the provisions of this act limiting pilots' liability; and"

Section 35: (p. 857) Where pilot gives the bond provided for by Section 17, he shall not be liable beyond the amount of the bond and the amount payable to him for pilotage for the voyage.

The peculiar position of pilots, and the protection of men whose skills are so essential to the movement of ocean commerce, has, of course, always been a matter of careful concern of this Honorable Court, as shown by the decision in *Kotch v. River Port Pilot Commissioners*, 1947, 330 U.S. 552, at 557, where the court reviewed the essential role of the pilot and used the following language:

"Studies of the long history of pilotage reveal that it is a unique institution and must be judged as such."

Surely the conclusion of the other Courts of Appeals that Your Honors did not intend to deny tugmaster servants of towing companies the protection of pilotage exculpatory clauses by the Bisso decision, and the English view that such clauses are valid and their statutory view limiting a pilot's liability to slightly more than 100 pounds is far better calculated to promote commerce and attract to the harbor movement of vessels the skills of mariners of modest means than the treatment accorded petitioner below in denying him the protection of a clearly expressed agreement of which he was a third-party beneficiary and holding him liable for hundreds of thousands of dollars!

No Considerations of Public Policy Such as "Monopolistic Conditions" or the Ability to Drive "Hard Bargains" Are Applicable to Petitioner Gray's Rights

Petitioner Gray respectfully submits that *certainly as to him* the reasons stated by the trial court for its decision holding the pilotage clause void and thus denying petitioner the protection of the contract do not have any validity. Whatever basis there may be in the facts or circumstances of the present case for the trial court's holding (and there is no showing that conditions in the port of Galveston with respect to the towage of oceangoing vessels are unique and so completely different from such conditions in all the other American harbors and in the ports of the other great maritime nation, England, that harbor towage contracts valid elsewhere should be found invalid in Galveston, Texas), they do not apply to petitioner.

Petitioner had no monopoly of pilotage of vessels in Galveston harbor. Your Honors will of course take judicial knowledge of the pilotage laws of the United States, under which he held a pilot's license for the waters of Galveston harbor, and these of course give no person a monopoly. Even if he had been a state-licensed bar pilot and not simply a federally-licensed pilot, Your Honors have clearly held that monopolistic conditions are *not* against public policy as far as such pilots, whose numbers are limited and hence might be termed "monopolistic," are concerned. *Kotch v. River Port Pilot Commissioners*, 1947, 330 U.S. 552, a case dealing with the neighboring Gulf port of New Orleans, and *Olsen v. Smith*, 1904, 195 U.S. 332.

If petitioner be found merely an employee or servant of a towing company and not really a pilot, certainly there is no showing that he was the only person in the port of

Galveston who could have been engaged to handle the movement of this ship, even though he was the employee of G. & H. Towing Company who was ordinarily assigned to pilot or direct the movement of "dead" ships.

To say that petitioner Gray had the power to drive hard bargains would be fanciful. Of course petitioner was simply an employee, directed to perform certain acts. There is no evidence that he had anything to do with making towing contracts in Galveston harbor. How could he, a simple mariner, drive hard bargains with respect to anyone?

Why should he be placed in the same legal position as his employer?

Why should he, a simple mariner directed by his employer to go aboard the vessel here, and paid a few dollars, be held liable to indemnify the vessel's operator, a common carrier, for hundreds of thousands of dollars, and be denied in Galveston harbor the protection of indemnity accorded tug companies and their agents elsewhere in the world?

CONCLUSION

Petitioner Gray therefore prays that his petition for rehearing be granted and that this Honorable Court grant writ of certiorari to review the decision of the Court of Appeals herein, and on hearing thereafter that decision be in all things reversed as to him and he be granted the relief to which he is justly entitled.

Respectfully submitted,

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner

CERTIFICATE (Rule 58)

I certify that the within petition for rehearing of the order of the Honorable the Supreme Court of the United States denying the petition for writ of certiorari to issue to the Honorable the Court of Appeals for the Fifth Circuit entered October 9, 1961, is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of the Supreme Court Rules, namely intervening circumstances of substantial effect or other substantial grounds available to petitioner and not previously presented.

ROBERT EIKEL
1910 Tennessee Building
Houston 2, Texas
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that service of the within petition was made upon Armstrong, Bedford & Lambdin, 201 National Hotels Building, Galveston, Texas, and McLeod, Mills, Shirley & Alexander, 801 Santa Fe Building, Galveston, Texas, attorneys for respondents other than Maritime Overseas Corporation, and Eastham, Watson, Dale & Forney, 538 Mellie Esperson Building, Houston, Texas, attorneys for respondent Maritime Overseas Corporation, claimant of the M/V HAR CANAAN, by placing copies thereof properly addressed to each of them in the United States mail with adequate postage ~~affixed thereto~~.

Robert Eikel

APPENDIX I.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18619

EMMETT GRAY, G & H TOWING COMPANY and MARITIME OVERSEAS CORPORATION,
Appellants

v.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION, and PELICAN ISLAND DEVELOPMENT CORPORATION,
Appellees

Appeal from the United States District Court for the Southern District of Texas

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(March 15, 1961)

Before TUTTLE, Chief Judge, HUTCHESON, Circuit Judge, and CLAYTON, District Judge.

HUTCHESON, Circuit Judge: This appeal is from findings and a judgment in admiralty in favor of the libellants, in a suit brought by them as owners of pipe lines, for damages resulting from their negligence destruction in the course of shifting the M/V Har Canaan as a dead ship to a slip in Galveston Harbor.

A great deal of testimony was taken on the issue of fault, and the district judge made full findings in effect that the destruction of the pipe lines was due to the negligence of the respondent, Emmett Gray, port captain for G & H Towing Co., who was furnished by it as a pilot for the dead ship movement.

Based on these findings, the court adjudged: (1) Gray liable; (2) the Har Canaan liable in rem; (3) Maritime Overseas, owner of the Har Canaan, not liable in personam; and (4) G & H Towing Co., the employer and furnisher for the movement of Emmett Gray, its port captain liable in personam. He als denied and awarded indemnity as follows:

> "Thus, as to the liability over between the several respondents, the following conclusions are made.
>
> "6. G & H Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the Har Canaan, for any payment they may be required to make under the decree to be entered herein.
>
> "7. Maritime Overseas Corporation, as claimant of the Har Canaan, is entitled to indemnity from Captain Emmett Gray, individually, and from G & H Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G & H Towing Company to Maritime Overseas will be joint and several."

Gray, as the respondent held primarily liable, here insisting that the findings and conclusions, that he was negligent in handling the ship so as to cause injury to the pipe lines, are clearly erroneous, launches massive attacks upon the findings, that he was negligent, and urges upon

us that the cause of the injury to the pipe lines was negligence not on his part but on the part of the pipe line owners in not properly laying and maintaining the lines in place and in not clearly and properly marking their location.

The other appellants join him in this attack and argue mightily that the district judge has misconceived what actually occurred and that the findings of negligence are against the truth and right of the case.

The G & H Towing Company, in addition to its attack upon the negligence findings of the court, strongly attacks the court's conclusion, that the clause in its contract providing in effect that it would not be liable for the acts of pilots furnished by it would not avail it, as an erroneous conclusion of law, and urges that, because of that clause, Gray's negligence would not be imputed to it, and it could not, therefore, be held liable for it.

The Har Canaan and Maritime Overseas Corporation, its owner, argue vigorously that they were not responsible and cannot be held liable for the negligence of the pilot. Each of these argues that the conclusions on indemnity are wrong.

For the reasons hereafter stated, we are of the opinion: that the district judge was right throughout in his findings of fact and in his conclusions of law, that Gray was guilty of negligence in causing the anchor to be dropped upon the pipe line, and that, as a result of his negligence, he and the other respondents found liable are liable to the pipe line owners for the damage done them; and that the right of exoneration, action over, or indemnity is as he concluded it to be.

Taking up first the primary question of whether the findings of fact as to fault should be set aside, we think

it sufficient to briefly say that the matter of fault or negligence is a disputed issue, and that, on the record as a whole, there was ample evidence for the district judge to find, as he did: that Gray and, therefore, the Har Canaan and its owners, and the G & H Towing Company knew that the pipe lines were laid in the slip under permit; that the burden was heavily upon them to show, in defense of their act in dropping the anchor, that they had made proper inquiries as to just where they were laid; and that due care had been used in dropping the anchor to avoid striking and injuring them in the course of the ship's movement; that, in short, Gray and the other respondents could not shift liability for the affirmative acts causing injury to the pipe line as a result of dropping the anchor on the lines by complaining here that, as matter of law, the pipe line owners were at fault in not marking more precisely the position of the lines, or that the findings that they were not are clearly erroneous.

In declaring these views, we are not holding that the district judge could not have found the fault and responsibility as these contend he should have. We are holding, though, that it was entirely proper for the district judge to find, as he did, upon the whole facts, that the proximate cause of the injury sued for was the failure of Gray to use due care to find out just where the pipe lines were, in that, without soundings or otherwise taking adequate precautions to precisely locate the pipe lines, he dropped the anchor on them with damaging results.

With the highly important question of primary fault for the injury thus disposed of by our holding that the court's findings as to Gray's negligence are not clearly erroneous and must be approved, we turn to the other questions raised by the several appellants.

The first of these is the complaint of all the appellants, including Gray, that the district judge erred in refusing to give effect to the pilotage clause[1] in the towing contract, providing in effect that neither Gray nor the Towing Company, his employer, would be liable for the negligence of Gray, its employee, indeed its port captain.

Of this, we think it sufficient to say that we agree with the district judge's conclusion that the libellants, strangers to the contract, cannot, of course, be held bound, or in any way affected, by its terms; and also with his conclusions with respect to actions over for exoneration or indemnity that appellants are bound and precluded by the decision and holding in *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, that such a clause is invalid. In addition, we think it clear that respondents' reliance on *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, will not at all do there, both because of the decision in the Bisso case, which, on full consideration, rejected the Dalzell case as authority for the position here taken, and because the Dalzell case dealt with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots, and Gray in the case was not such a pilot. Though called a pilot, he was merely the person in direct command with respect to a dead ship towing operation

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1 "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel, or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for (sic) any act, omission or order of said pilot."

who, as such, conducted the operation by coming on board. Look at it as one will, nothing more can be made of this case than that it is a mere case of a towing service furnished by G & H Towing Company and performed by its port captain who, though denominated "pilot", was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship, and the effort to limit the liability of the towing company for the acts of those furnished by it to conduct the towing maneuver must fail here, just as it failed in the Bisso case, and the judgment denying effect to the invoked clause of the contract must be affirmed.

We are also of the opinion that there is no merit whatever in Gray's claim that he is protected from liability for his own fault by the terms of the contract, even if it were otherwise regarded as valid. Neither is there any merit in the claim of Maritime Overseas Corporation and Har Canaan, that they are not liable for Gray's acts because, under the law governing pilotage, they could not be held liable for the pilot's negligence. We find nothing in the cases cited by them, nothing in the cases generally, which supports this claim. Indeed, we think the cases have settled the law to the contrary, even in a case of true involuntary or compulsory pilotage. Cf. *Publicker Industries, Inc. v. Tug Boat "Neptune" Company et al*, 171 F.(2) 48; *United States v. Chris Nielson*, 349 U.S. 129. We are, therefore, of the clear opinion that the court's findings of fact as to fault in the injury to the pipe lines cannot be set aside as clearly erroneous; that his conclusions, that the respondents held liable were in fact and in law responsible to the libelants, are correct and may not be set aside; and that all questions as to actions over for exoneration and/or indemnity were correctly decided, and the decree is in all things AFFIRMED.

APPENDIX II.

No. 18619

JUDGMENT (OF THE COURT OF APPEALS)

Extract from the Minutes of March 15, 1961

EMMETT GRAY, G. & H. TOWING COMPANY, and MARITIME OVERSEAS CORPORATION,
Appellants

v.

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE COMPANY, MERRITT-CHAPMAN & SCOTT CORPORATION and PELICAN ISLAND DEVELOPMENT CORPORATION,
Appellees

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Emmett Gray and G. & H. Towing Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (OF THE UNITED STATES DISTRICT COURT)

STATEMENT OF THE CASE

This proceeding is brought in rem against the Israeli vessel HAR CANAAN, claimed by Maritime Overseas Corporation; in rem against the Tug J. R. GUYTON, owned by Bay-Houston Towing Company; in rem against the Tugs JUNO and ALBATROSS, owned by Suderman & Young Towing Company; and in personam against Bay-Houston Towing Company; Suderman & Young Towing Company, and G. & H. Towing Company, the charterer and operator of the three tugs named, and Emmett Gray, an individual, employed as Port Captain by G. & H. Towing Company. The Libellants are Pelican Island Development Corporation, the owner of the pipeline work which was damaged in this casualty; Merritt-Chapman & Scott Corporation, general construction contractor for the Pelican Corporation; Edwin E. Johansson, sub-contractor under Merritt-Chapman & Scott for construction of water and sewer pipelines between Galveston Island and Pelican Island; and Kansas City Bridge Company, sub-contractor under Johansson for the cross channel portion of this construction which was immediately involved. By impleading petition of cross-libel, Maritime Overseas Corporation asks indemnification from the Tugs J. R. GUYTON, JUNO, and ALBATROSS, and from all the named respondents, for any recovery libellants may obtain against the HAR CANAAN or her claimant, and by impleading petition or cross-libel, those same respondents jointly and severally ask indemnification from Maritime Overseas Corporation for any recovery libellants may obtain against them.

A trial having been had on the issues of liability alone, and having received and considered the evidence and the briefs and arguments of the proctors for the respective parties, these Findings and Conclusions are made by me pursuant to Admiralty Rule 46½.

FINDINGS OF FACT

1. The channel between Galveston Island and Pelican Island is a part of the Galveston harbor. Slip A is immediately west of Pier 41 on the Galveston Island or southerly side of this channel. The width of the channel at this point is approximately 1400 feet, and the channel at this point is dredged to a depth of approximately 35 feet between the harbor lines, a distance of 1125 feet.

2. On April 12, 1956, a permit was issued to libellants through the office of the United States Corps of Engineers for the construction of water and sewer mains, each approximately 12 inches in diameter, to be laid in a trench across the Galveston channel, and at a depth not less than 50 feet below mean low water. By amendment of the permit on December 16, 1957, the center line for this crossing, at the southerly or Galveston Island end, was established at a point which the evidence shows to be approximately 18 feet eastward from the northeast corner of Slip A, and the line of bearing for the crossing from that point was N 10° 23′ 25″, or almost directly across the channel to a point opposite on Pelican Island.

3. Acting under this permit, as originally issued and so amended, Merritt-Chapman, as general contractor for the Pelican Corporation, contracted with Johansson for the construction of these pipelines, and Johansson in turn subcontracted to Kansas City Bridge Company that part of the work which involved laying the sub-aqueous lines. A

trench was dredged across the channel to the necessary depth of 51½ feet, which was approximately 16 feet deeper than the normal depth of the channel between the harbor lines. The dredged trench followed the center line of the crossing as established by the amended permit, and extended about 50 feet to either side of that centerline. This portion of the work was completed prior to November 27, 1957, and soundings of the trench were made by the United States Corps of Engineers on that date. Late in 1957, Kansas City Bridge Company began receiving sections of the steel pipe to be laid at a job site at the Pelican Island end of the crossing, and for sometime thereafter was engaged in welding short sections of this pipe into 400 foot lengths, testing the welds, and covering this pipe with a protective wrapping. Meanwhile, in December, 1957, and January, 1958, a large "whirley" or crane barge was used to dredge the ends of the trench outside of the harbor lines. A cavein of the bulkhead at the northeast corner of Slip A, caused by this dredging, was repaired in December, 1957. In January, 1958, a bulldozer was used to cut a 400 foot ditch on Pelican Island into which the long sections of pipe could be placed preparatory to their being drawn into the water.

4. On January 27, 1958, pulling cables were stretched across the channel, and the leading section of each pipeline was hung below a barge at the Pelican Island end. On the ensuing four days, the two pipelines were drawn behind this barge and laid in the trench across the channel which had been dug to receive them. On January 31, 1958, the channel was cleared again for marine traffic. Between February 6 and February 25, 1958, the whirley barge was employed as riser sections were welded to the two pipelines, first at the Galveston Island end, then the Pelican Island end. Between February 27 and March 4, 1958, divers were used to walk the pipelines and ascertain their position

and alignment. The whirley barge was used to uncross the lines at one point in mid-channel during this work. On March 5, the lines were filled with water for hydrostatic pressure tests, and they remained filled with water until the later casualty.

5. The remaining work on the pipelines prior to the casualty in suit, which occurred on March 21, 1958, was concerned with the construction of a thrust block over the risers at the Galveston Island end, just east of the entrance to Slip A, and immediately in front of the bulkhead between Slip A and Pier 41. Sleeves were welded around the risers where they passed through the bulkhead, a wooden form was constructed for the thrust-block, and this was lowered into place over the risers after the ground had been cleared by a diver. On the morning of March 21, and at the time of the casualty, concrete was being poured for this thrust-block. A diver was then below directing this work, and his tenders were on the deck of the whirley barge which lay at the northeasterly corner of Slip A, and partly into that Slip. The crane of the whirley barge extended over the work area. On the channel side of the bulkhead, a small "sea mule" and a larger flat barge were immediately above and adjacent to the work area, and personnel employed by Kansas City Bridge Company were on these work boats as well as upon the bulkhead.

6. In addition to the physical evidence already related showing the construction and placement of these pipelines across the channel, and to the notice thereof contained in the permit issued by the United States Corps of Engineers, at least three "Notices to Mariners" had been issued by the Corps of Engineers, on November 15, 1957, December 23, 1957, and January 16, 1958 advising of this construction. On December 30, 1957, double signboards, measuring

7 feet 10 inches, by 16 feet, on each face, and bearing large letters reading "WARNING—PIPE CROSSING—DO NOT DRAG ANCHOR" were placed on either side of the channel, the sign on the Galveston side being centered about 31 feet east of the center line established for the crossing, and the sign on the Pelican side being centered about 115 feet east of this center line. The legend of either sign was easily visible to any ship proceeding up or down the channel.

7. The Israeli ship HAR CANAAN is a dry-cargo vessel of 10,311 gross tons. Her length is 515 feet 2 inches, and her beam is 66 feet 7 inches. She carried two anchors forward, each weighing approximately 8900 pounds. At the time of this casualty the ship was light and drawing approximately 10 feet. Her forecastle deck was approximately 40 feet above the water line, her bridge deck was approximately 60 feet above the water line, and the horizontal distance from the hawse-pipes in the bow of the ship to the bridge was about 200 feet.

8. On the morning of March 21, 1958, the HAR CANAAN was fully manned, equipped and seaworthy excepting that her main engines were shut down for repairs. Her agents at Galveston, Strachan Shipping Company, gave an order to Bay-Houston Towing Company to furnish three tugs and a pilot to move the HAR CANAAN as a "dead" ship from Pier 15, where she was then lying, to Sunset Grain Elevator at the inner end of Slip A. The distance between these points was approximately two miles.

9. Bay-Houston Towing Company held a contract with Maritime Overseas Corporation, operator of the HAR CANAAN, to move its vessel on stated rates and terms.

10. The only towing companies offering tug service for shifting ocean going vessels in the port of Galveston at

the time in question were Bay-Houston Towing Company, Suderman & Young Towing Company, and Intracoastal Towing & Transportation Company. Each of these companies owned a number of harbor tugs. These three "owning companies" competed with one another in the sense that they solicited their own business, made their own contracts, and invoiced the towed vessels for the service performed. However, the services which were available to the owners and operators of ocean going vessels in the port of Galveston from the three "owning companies" were identical. This comes about in that the three "owning companies" did not operate their own tugs, but all three chartered, bareboat, their tugs to G. & H. Towing Company, an operating Company, which was owned jointly by the three "owning companies". In carrying out the orders for towing service, G. & H. Towing Company would use the tugs which were most readily available and convenient, without regard to the ownership, and regardless of which of the three "owning companies" may have had the contract with the vessel to be towed. The contracts between the "owning companies" and the vessels (or their owners or charterers) expressly allowed for performance in this manner. The contracts offered by the three "owning companies" (their owners or charterers) were identical in terms, and upon a single printed form. The rates too were the same, save for an exclusive contract a ten percent (10%) reduction was allowed. The contract with Maritime Overseas was of this nature, and carried the ten percent (10%) discount.

11. Among the other provisions of this contract, to which reference is made for all purposes, was the following provision, which by reason of its significance is quoted here:

> "Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect to all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot."

12. Captain Emmett Gray, one of the respondents, is full time and salaried employee of G. & H. Towing Company. Prior to March 1, 1958, he had served for several years as night dispatcher for G. & H., and on that date he became Port Captain for G. & H., and was placed in full charge of the dispatching office. Since 1932, he has held an unlimited pilot's license covering Galveston harbor, as well as other adjacent waters. As Port Captain for G. & H., he was the "dead ship" pilot assigned by his employer for all shifting of dead ships within Galveston harbor when the tugs operated by G. & H. were employed. Out of the fixed charge made for shifting a vessel without her power, Captain Gray received a percentage of this charge (in addition to his salary from G. & H.), with the balance of the charge going to the company owning the contract (one of the three "owning companies"), and G. & H. as the operating company. In this regard, it should be noted that Captain Gray's duties with G. & H. did not contemplate, nor did he accept, employment as a harbor or branch pilot (meeting incoming vessels at the sea buoy, and bringing

them, usually under their own power, into Galveston harbor, with converse service for out going vessels.)

13. On the morning of March 21, 1958, Captain Gray boarded the HAR CANAAN as she lay at Pier 15, and assumed the conning of the vessel. He informed her Master of his intention to use the port anchor in turning the ship into Slip A, and the First Mate of the HAR CANAAN, with a deck crew, was stationed in her bow and the anchor made ready for use on orders from the bridge. Thereupon, the HAR CANAAN was moved westerly down the channel toward Slip A, with the Tugs JUNO, ALBATROSS, and J. R. GUYTON, made up alongside and providing the only motive and directional power for the vessel under orders given directly to them by Captain Gray from the bridge of the HAR CANAAN. The Master of the HAR CANAAN was also upon the bridge of his vessel at all times during the maneuver, and he relayed to the First Officer in the bow and the crew orders as received from Captain Gray during the maneuver, including the order to let go the port anchor. The helm of the HAR CANAAN was lashed, as her propelling machinery was shut down, and she had no steerageway of her own.

14. Shortly after noon, as the HAR CANAAN reached the vicinity of Pier 41, she was navigated by the tugs at an angle from the center of the channel toward the opening of Slip A. Captain Gray then ordered the port anchor to be dropped, with one shot of chain, and this order was promptly executed. Subsequently, the bow of the ship, with anchor down, continued to move toward the northeast corner of Slip A and came within about 10 feet of contact with the whirley barge in that position before the anchor was heaved in some five minutes later. Almost immediately after the anchor was dropped, violent move-

ments of the sewer pipe, which was westerly of the two pipes being laid, were perceptible to the workmen on shore as well as to the diver working underwater. Sounds such as would have been caused by the breaking of the pipeline were also heard by the workmen on shore when the anchor of the HAR CANAAN was heaved in. Subsequent investigations did show that the sewer line was badly bent or broken, but still in the trench, at a point approximately 250 feet out in the channel, and was completely broken at a point only 90 feet from the bulkhead, with the ends of the pipe at this point pulled out of the trench and lying in front of the opening to Slip A.

15. Immediately prior to the arrival of the HAR CANAAN at Slip A on the 21st of March, 1958, the water and sewer lines were being constructed by libellants in accordance with the permit duly issued for that purpose, and these two pipelines were properly situated at the depth and in the position prescribed in such permit, as amended December 16, 1957.

16. The port anchor of the HAR CANAAN was dropped on, or dragged over, one, or perhaps both of said lines, on March 21, 1958, breaking the sewer line, the more westerly of the two, and causing damages to each of the libellants in amounts to be determined.

17. Captain Gray was negligent in giving the order to drop the anchor when he should have been aware of the construction and presence of the pipelines from general knowledge, the Notices to Mariners, and the prominent warning signs which were plainly visible.

18. Captain Gray was not misled by the position of the warning signs, and was negligent in giving the order to drop the anchor without regard to the presence of the pipelines.

19. The tide was nearing the end of the ebb, and the wind was from the southeast at force three, although neither weather, wind nor tide were factors of any consequence in the handling of the HAR CANAAN at the time, and no emergency or necessity required that the anchor be dropped at the place where it was dropped.

20. Captain Gray was acting within the scope and course of his employment by G. & H. Towing Company at all times material hereto, and was not a loaned servant to the vessel or her operators at such times.

21. The Master of the HAR CANAAN was not negligent in failing to intervene, or displace, the pilot when the order to drop the anchor was issued by Captain Gray, because the situation was not one of obvious danger, and the pilot's lack of knowledge was not manifest so as to warrant intervention by the Master.

22. Neither the Master nor crew of the HAR CANAAN was negligent, or at fault, in any particular.

23. The assisting tugs were properly maneuvered by their crews in accordance with orders given them, and were in no way at fault.

CONCLUSIONS OF LAW

1. Captain Emmett Gray is personally liable for his own acts of negligence.

2. G. & H. Towing Company is liable for the negligence of Captain Gray as its employee.

3. The HAR CANAAN is liable, *in rem*, for the negligence of Captain Gray as her pilot

4. Libellants are entitled to recover their provable damages, as their interests may appear, from the HAR CANAAN, *in rem*, from G. & H. Towing Company, *in personam*, and from Emmett Gray, individually. The liability so decreed shall be joint and several.

5. Libellants are not entitled to recover from the tugs J. R. GUYTON, JUNO, or ALBATROSS, in rem, or from Bay-Houston Towing Company or Suderman & Young Towing Company, in personam.

The foregoing Conclusions dealing with the liability of the respondents to libellants, in my judgment, follow quite readily from the Findings of Fact set out above, and present no serious question of law.

The libellants obviously were not parties to the contract of towage between Maritime Overseas and Bay-Houston, and the liability of respondents to libellants has been determined without regard to the provisions of such contract.

In considering the question of liability over between the various respondents, however, the validity of the so-called "pilotage" clause (Finding No. 11) is placed in issue.

Maritime Overseas contends such provision is void, as contrary to public policy, relying primarily on *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, and the related opinions immediately following. Respondents G. & H. and Captain Gray in supporting the validity of the exculpatory provisions rely primarily on *Sun Oil Co. v. Dalzell Towing Co., Inc.*, 287 U.S. 291.

Under the facts found above, in my judgment, *Bisso* is controlling, by reason of the following circumstances, which I consider to have been stressed by the Court; (a) the vessel was being moved entirely under the power of the furnished tugs, and without power or control of her own; and (b) by reason of the monopolistic situation which prevailed in the vicinity of Galveston harbor, whereby a vessel had no freedom of choice in the type of towing contract offered, but must accept a contract with such exculpatory provisions if in fact it was to secure the assistance of tugs in its movement. Here, as in *Bisso*, the vessel was under complete control of Captain Gray, as an em-

ployee of the towing company, and such towing company did "have power to drive hard bargains."

The instant case is distinguished from *Dalzell* in these same particulars, for there the Court points out (a) "It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power."; and (b) "Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. . . . There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

Thus, as to the liability over between the several respondents, the following Conclusions are made.

6. G. & H. Towing Company and Captain Emmett Gray are not entitled to indemnity from Maritime Overseas Corporation, or from the HAR CANAAN, for any payment they may be required to make under the decree to be entered herein.

7. Maritime Overseas Corporation, as claimant of the HAR CANAAN, is entitled to indemnity from Captain Emmett Gray, individually, and from G. & H. Towing Company for any liability it will have to libellants under the decree to be entered herein. The liability of Captain Gray and G. & H. Towing Company to Maritime Overseas will be joint and several.

The Clerk of the Court will furnish counsel of record a copy hereof.

Counsel will present appropriate order promptly.

Done at Houston, Texas, this 24th day of December, 1959.

BEN C. CONNALLY
United States District Judge

APPENDIX IV.





TUGS:

C. R. HADEN
H. O. WEATHERBEE
J. R. GUYTON
JENNIFER GEORGE

LAURA HADEN
JUDY HADEN
R. T. McDOW
R. J. WALES

W. A. WANSLEY

[redacted] BARBARA GEORGE
HARRIS MASTERSON

TUG BOAT HARBOR TARIFF

EFFECTIVE APRIL 10 1957

BAY-HOUSTON TOWING CO

GALVESTON

504 National Hotel Bldg.
Phone 5-9381
Pier 10 Wharf Phone 3-4673

Night Phones { 3-4673 - 5-7534 / 5-6542

HOUSTON

811 Cotton Exchange Building
Phone: CApitol 2-6231
Dock Phone: WAlnut 8-5406

Night Phones { J Jackson 4-8635 / UNderwood 9-2701

CORPUS CHRISTI

Ore Dock
Phone: TUlip 4-8791 & TUlip 3-7843
Night Phone: 52 Ingleside

Gulf Coast Towing, Harbor Towing, Oil Lightering and Transportation

OIL BARGE IPS 201

CORRESPONDENCE AND WORK SOLICITED

B Tug Calls:_____ **(Long, Short, Long)**
H Tug Calls:_____ **(Long, Short, Long, Short)**

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

ASSISTING VESSELS

GALVESTON — TEXAS CITY

Docking or Off Docking, at Galveston, per tug	$180.00
Shifting, Dock to Dock, per tug	205.00
Off docking and to Bolivar Roads, per tug	230.00
Off docking and to Texas City and Docking, per tug	330.00
Bolivar Roads to Texas City or vice-versa, per tug	230.00
Docking, Off Docking, or Shifting at Texas City, per tug	230.00
Towing vessels or ocean-going barges from Galveston Bar to Bolivar Roads, Texas City or Galveston Docks, per tug. Per hour or fractional part Running time chargeable.	105.00
Shifting derrick barges—Galveston Harbor	85.00
Galveston to Bolivar Roads	85.00
Galveston to Texas City	135.00
Pilotage—Shifting Vessels Without Own Power	60.00

SPECIAL SERVICES

Pulling on ships aground When tug is engaged in assisting vessel, one-half hour free pulling time, each succeeding hour or fractional part	$ 90.00
When Tug not engaged in assisting vessel: Per hour or fractional part Running time chargeable.	95.00
Furnishing and delivering water to ships at anchorage: Per Trip	200.00

IN TOWING VESSELS OR BARGES, TOWED VESSELS TO FURNISH HAWSERS.

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $60.00 at Galveston and $90.00 at Texas City will be made.

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $60.00 per hour, with one-half hour free time allowed.

HOUSTON SHIP CHANNEL

BETWEEN	
Morgan's Point and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	$380.00
Morgan's Point and Baytown	230.00
Bolivar Roads and Morgan's Point or Baytown	470.00
Bolivar Roads and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	455.00
Galveston and Baytown	440.00
Texas City and Baytown	440.00
Houston and Norsworthy, Crown, Galena or Sinco	240.00
Houston and Todd Shipyards, Port Adams, Sheffield, Shell or Ordnance Depot	330.00
Galveston and Houston	580.00
Bolivar Roads and Houston	580.00
Texas City and Houston	580.00
Morgan's Point and Houston	430.00
Houston and Baytown	405.00
Baytown and Ordnance Depot, Shell, Port Adams, Todd Shipyards or Sheffield	380.00

(Norsworthy, Crown, Galena, Sinco, Clinton, Manchester take same rates as Houston from above points.)
Above charges including Docking or Off Docking.

TOWBOAT HARBOR TARIFF
GALVESTON, TEXAS CITY AND HOUSTON SHIP CHANNEL

HOUSTON SHIP CHANNEL
DOCKING AND OFF DOCKING

Docking or Off Docking at all points between Manchester Terminal and Turning Basin, both inclusive	$185.00
Docking or Off Docking at points below Manchester to Norsworthy, inclusive	150.00
Docking or Off Docking at points below Norsworthy to Ordnance Depot, inclusive	230.00
Docking or Off Docking at Baytown	250.00

SHIFTING

Shifting vessels between docks at Manchester Terminal and Turning Basin, both inclusive, per tug	$200.00
Shifting vessels between points below Manchester to Norsworthy, inclusive, per tug	230.00
Shifting vessels from one point to another on the same dock between points below Norsworthy to Ordnance Depot, inclusive	290.00
Shifting vessels between points below Norsworthy to Shell, inclusive, per tug	330.00
Shifting from one berth to another at Baytown	230.00

MISCELLANEOUS SERVICES

Pulling on ships aground	
When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part	80.00
When tug is not engaged in assisting vessel, per hour or fractional part	95.00
Running time chargeable	

The above rates to apply for a single tug

Tugs ordered to stand by but not put to work will be charged for the same as if pulling

Rates for towing dead ships between points on Houston Ship Channel, other than above specified, will be charged for on "pulling time basis"

All towed vessels to furnish towing hawsers

Holding vessels off dock and redocking, shifting rates to apply

Standing by or holding vessel in stream or alongside bank waiting for berth, pulling time rate will apply

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charge of $80.00 will be made

Furnishing and delivering water to ships, Per Trip	200.00

DETENTION

Detention caused by vessel not being ready at time specified when tug ordered to be charged for at $80.00 per hour with one-half hour free time allowed

PORT ARANSAS — CORPUS CHRISTI

Docking, off docking or shifting at Harbor Island	$280.00
Assisting between Harbor Island and Corpus Christi	430.00
Sea to Ingleside	380.00
To dock at Ingleside:	
When tug is at Ingleside	290.00
When tug is not at Ingleside	380.00
Assisting between Ingleside and Harbor Island	380.00
Assisting between Ingleside and Corpus Christi	380.00
Sea to Corpus Christi and dock	430.00
From outside bridge at Corpus Christi and to dock at Turning Basin wharves	210.00
To dock at wharves in Corpus Christi Turning Basin	180.00
Shifting in Corpus Christi Turning Basin	205.00
Sea to Terminal of the Reynolds Metal Company (Near Ingleside)	395.00
Docking or undocking at the Terminal of the Reynolds Metal Company (Near Ingleside)	195.00
From outside bridge to all points between Sunray Dock, and Oil Docks 3 & 4, inclusive	230.00
From Turning Basin inside the bridge to above docks	220.00
To docking or off docking at above docks	220.00
To shifting between above docks or between above docks and docks in Corpus Christi Turning Basin	230.00
Pulling on ships aground:	
When tug is engaged in assisting vessel, one half hour free pulling time, each succeeding hour or fractional part	80.00
When tug is not engaged in assisting vessel, per hour or fractional part	95.00
Running time chargeable	

When Tug ordered to certain points to perform services and orders cancelled after Tug leaves berth, minimum charges of $80.00 at Corpus Christi and Harbor Island, and $90.00 at Ingleside will be made

The above rates to apply for a single tug

Detention—One half hour free time, thereafter, per hour	60.00
Furnishing and delivering water to ships at Harbor Island, Ingleside, or Corpus Christi, Per Trip	200.00

OVERTIME RATE

20% will be added to the tariff rates for all work performed between the hours of 5 P.M. and 7 A.M., also for work performed on Sundays and Holidays and Mondays following Holidays

Overtime Rate to apply when service is started and/or completed in an overtime hour

Starting time will be the time Tug leaves berth and time of completion will be the time Tug returns to berth

FORCE MAJEURE

Neither party shall be responsible for delays, failures or omission hereunder due to strikes, lockouts, labor disturbances, riots, fire, earthquakes, storm, lightning, epidemics, war disorders, acts of God, etc.

The rates quoted herein, and the furnishing of tug power for harbor or other towage undertaken hereunder, are founded on the consideration that this agreement shall not be construed to be a personal contract, and it is understood that

BAY-HOUSTON TOWING COMPANY

and the parties at interest with us shall have the benefit of the exemption from liability contained in the United States Limitation of Liability Statute, Title 46 U.S.C.A. 181 to 184, both inclusive.

_____, 195__

The Bay-Houston Towing Co. offers to meet your steamers upon arrival at Galveston, Houston, Texas City, Corpus Christi, or Port Aransas, and provide tugboat power for your steamers while in port, in accordance with towboat tariff shown herein and conditions named therein.

Should Bay-Houston Towing Co. tugs be not conveniently available for the required services, the said Bay-Houston Towing Co. shall have the right to designate or engage the tugs, and such other tugs and their owners or operators shall be covered by this contract as though they were Bay-Houston Towing Co. tugs.

Whenever any pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant, agent and employee of said vessel, and her owners and/or charterers in respect of all acts done by him, or all omissions, and all orders given by him to any tugs engaged or to said vessel or otherwise, in the movement or handling of said vessel, or in connection with any decisions made by said pilot as to the manner or method of handling said vessel, and none of the tugs or their owners, agents, Masters, servants, employees or charterers shall be responsible or liable for any act or omission of said pilot, or for any claims or damages caused by or resulting for any act, omission or order of said pilot.

This contract to become effective on the date shown above and to remain in force until _____ and to continue thereafter from year to year until cancelled by either party on an anniversary date of this contract. After written notice, rates named herein may be adjusted in the light of increase or decrease in operating expenses due to changes in laws or regulations and changes in working conditions of labor and labor costs in all branches.

All charges are net, except when services are performed under contract, then a discount of ____% is to apply on all tariff rates.

BAY-HOUSTON TOWING COMPANY

By _____

ACCEPTANCE

We accept the offer of the Bay-Houston Towing Co. for all tug power our steamers, or steamers operated for our account, unless otherwise bound by charter may require at the Ports of Galveston, Houston, Texas City, Corpus Christi and Port Aransas, in accordance with the rates and conditions named in tariff shown herein.

_____

By _____

APPENDIX V.

1961 AMERICAN MARITIME CASES

INTERNATIONAL TERMINAL OPERATING CO., INC., Libellant
vs.
NAVIERA AZNAR S.A., S. S. MONTE URQUIOLA, TUG FRANCES TURECAMO, B. TURECAMO TOWING CO., B. TURECAMO COASTAL & HARBOR TOWING CORPORATION, TUG KATHLEEN TRACY AND M. & J. TRACY, INC., Respondents.

United States District Court, Southern District of New York
March 16, 1961.
In Admiralty—No. 19832

COLLISION—232 Presumptions—PILOTS—133 Liability of Owner of Vessel—TOWING—113 Exemptions from Liability—Pilotage Clause—1612 Helper Tug

Pier owner sued for damage to pier caused by steamship while being undocked under her own power with the assistance of two tugs, one at the bow and the other at the stern. **Held:** The owner of the bow tug and the steamship owner were jointly and severally liable for the damage. (1) The contact with the pier raised a presumption of negligence against all parties assisting in the management of the steamship which only the tug at the stern succeeded in rebutting. (2) Under the pilotage clause the pilot's negligence (proceeding too fast astern and delay in giving proper orders) was imputable to the steamship to the extent that the faults of a pilot are within the scope of the pilotage clause, his employer is entitled to indemnity from the shipowner. (3) Although operating under the pilot's supervision, the bow tug was independently at fault for failing to prevent the contact.

ALEXANDER, ASH & SCHWARTZ (Edward Ash, Advocate), Proctors for Libellant.

DAWSON & WAALAND (Thorolv T. Waaland, Advocate), Proctors for Respondent, Naviera Aznar S.A.

HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON (Henry C. Eidenbach, Advocate), Proctors for Respondents, B. Turecamo Towing Corp. and B. Turecamo Coastal and Harbor Towing Corporation.

MACKLIN, SPEER, HANAN & McKERNAN (John C. Hart, Advocate), Proctors for Respondent, M. & J. Tracy, Inc., and Claimant, W. J. T. Towing Line, Inc.

1758.

THOMAS F. MURPHY, D. J.:

This proceeding *in rem* and *in personam* arises out of damage to libellant's dock in Hoboken where the S. S. *Monte Urquiola* was moored and undocking on August 19, 1958, under its own power and with the assistance of two tugs.

Libellant sues the ship, the owners of the ship, and the tugs *Frances Turecamo* and *Kathleen Tracy* and their respective owners. At the beginning of the trial there was a concession that the libellant was the owner of the dock and respondents were the owners of the ships and tugs involved except that M. & J. Tracy, Inc. was conceded to be not the owner of the *Kathleen Tracy* but another Tracy Company was, and it was substituted in lieu thereof and the libel dismissed against M. & J. Tracy, Inc.

The ship was moored bow end in to the south side of Pier 9 so that its starboard side was next to the pier. The tide was ebbing and the wind moderate from the south or southwest. The time was about 7:15 p.m. One eye-witness, a tug captain who was standing on the bulkhead at the time, testified that at the beginning of the undocking operation the two tugs took positions at right angles to the ship, the *Tracy* tug into the port quarter and the *Turecamo* tug into the port bow. As the ship was moving astern he noticed that the *Turecamo* tug was pushing and he yelled to the foreman on the pier that it was going to hit the pier and the foreman yelled "no" that the fenders would stop it. In any event the ship's rake hit the steel girders and damaged the pier's superstructure. He testified, also, that as the stern of the ship was going downstream, the bow was pushed into the dock, and although he did not see any of the fenders break loose, he knew that one had broken loose

because he picked it up later and brought it back, though he could not say whether it was the one that was inshore or outshore.

The other eye-witness was an employee of the shipping company agent, who testified that the line from the *Turecamo* tug to the ship was slack and she was making no quick water. In other words, instead of pulling the bow out she permitted it to go in as the stern went out causing it to hit the pier.

Libellant's employee on the pier, i.e., the foreman who had charge of the lines, said that he was told by the mate on the ship to let go of the lines, as he saw the ship coming closer to door No. 12 where he was standing on the stringpiece, he ran away and when he came back he noticed that the ship had taken one of the fenders with it. The lines that moored the fenders were 4" in diameter. He said he never saw a ship pull out so fast.

The respondents' witnesses were, first, the captain of the ship, who said that he transferred the orders from the undocking pilot to the third officer; he said that when the pilot came aboard and everything was in readiness he so advised the pilot and was told to cast off all the lines. The pilot then gave the order for half-speed astern which is about 5½ to 6 knots or 40 revolutions. He testified further that he did not understand the signals that the pilot gave to the two tugs, one by the ship's whistle and one by mouth whistle; that he could not see the tug under the bow but he could see the stern tug and it appeared to be keeping the ship against the current; that he saw one of the fenders broken and floating with its moorings; that the pilot gave an order for a right rudder and that the pilot's orders were correct; that his ship had a draft of 17' aft and 12' forward and was on an even keel. On cross-examination he said that the "half-speed astern" order was the

only order given until the accident; that the order for a starboard rudder was after the accident; that the fender became loose a few seconds before the accident, and that at no time could he see the tug on the port bow. He testified that the ship is 148 meters long or 475′ and the pier on the south side 624′. It was a motor ship with one propeller and he admitted that in motion astern it has a tendency to go to its port.

The next witness for the ship was the company agent's employee who, in addition to what he testified to above, said that when he gave the order for the tugs to the tug dispatcher, they agreed on the undocking time to be one-half hour before mean low water, and the dispatcher said this would be O. K. with the two tugs. He also testified that the *Tracy* tug was doing all it could do and that the stern was down the river despite the work of the *Tracy* tug.

By stipulation Exhibit B was offered in evidence, which embodies the contract between the ship and Turecamo and contains the pilotage clause relieving the towing company of liability in certain instances. It provides:

"When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power, goes on board such vessel, or any other licensed pilot goes on board such vessel, it is understood and agreed that such tugboat captain or licensed pilot becomes the servant of the owner of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, charterers, operators or managers shall be liable for any damage resulting therefrom."

The undocking pilot, Captain Joseph French, who worked for Turecamo at the time, testified that he gave the order

for the two tugs to take a position heading into the bow and stern and that he gave them the signal to work ahead slowly when the lines were let loose. He said he gave the orders for *slow astern* and that was executed. He then stopped the *Turecamo* tug by one whistle and gave the *Tracy* the signal of two whistles for full-speed, but when he saw the bow going into the pier he gave a two-blast signal to the *Turecamo* tug to go astern, which was acknowledged, but he could not see whether the order was carried out and the ship continued astern but the bow fell toward the pier. He then gave a hard right rudder order and the collision happened. After the ship was out in the stream he came back to help with the fenders and found that the one nearest the bulkhead had broken loose. He admitted in his examination before trial, and we find as a fact, that the lashings on the fenders broke due to the weight of the ship and the canting of the fender, just about the time of the collision on trial, he said just before the collision. In this examination he all but admitted that the accident happened because the *Turecamo* tug should have been able to, but failed to, hold her bow off the pier. She had enough power—1664 horsepower. He said that the stern of the ship was very near the end of the pier when they started and it was about one-quarter of the ship's length into the stream at the time of the accident and that the hard right rudder order was given about 30 seconds before the accident.

Captain Lyons who remained in charge of the tug *Frances Turecamo* also testified, and admitted that it was his job to keep the bow of the ship off the pier. He said he received one signal to come ahead slowly and another signal to stop, and he started to drift under the bow when he received a signal to go full astern but he said ' could not, and heard a noise and he was pulled under the bow.

Tracy produced two witnesses who did not testify but were offered for examination by any one. They were the alternate captain on the *Tracy* tug (the captain having died) and a deckhand.

The Turecamos claim indemnity over against the shipowner under the pilotage clause, if held liable, and the ship's answer was amended also to plead indemnity over against the Turecamo people.

The ship's log books were introduced (translations, as they were in Spanish) and they tended to support the captain and not the undocking pilot. In substance they say that at 19.15 the ship went one-half astern; at 19.19 it stopped and went slow astern, and at 19.20 when it was out in the stream it stopped again.

According to the logs it also appears that the accident happened at exactly 19.18, and it is described by the captain as "in view of a strong ebb tide and despite our efforts and the efforts of the tug boats we touched the pier."

It is the settled rule in admiralty that when a vessel comes in contact with a stationary object, there arises a presumption of negligence which operates against all parties participating in the mangement of the vessel at the time of the contact. *Patterson Oil Terminals, Inc. v. Port Covington*, 1952 A.M.C. 1745, 109 F. Supp. 953, 954-55, aff'd. 1953 A. M. C. 1371, 205 F. (2d) 694 (3 Cir., 1953). The burden rests upon those parties to rebut that presumption. We are satisfied from the evidence presented that the presumption has been sufficiently rebutted only as respects the *Tracy* tug and that, therefore, the libel must be dismissed as against that tug and its owners, and libellant is entitled to a decree against all other parties.

We find the pilot at fault in at least two respects, and, through him, the vessel and its owners as well as the pilot's

employer, Turecamo Coastal and Harbor Towing Corporation, who contacted to undock the vessel. *Pennsylvania Railroad Co. v. Beatrice*, 1958 A. M. C. 1612, 161 F. Supp. 136, 146-148, aff'd 1960 A. M. C. 1408, 275 F. (2d) 209 (2 Cir., 1960). The pilot was negligent in ordering the vessel to proceed astern at half-speed which, under the circumstances, was improvidently fast; he was also at fault in failing to exercise due care to see that the tug *Turecamo* was properly positioned to perform its function in the maneuver of keeping the bow of the ship away from the pier. From the testimony it appears that when he saw the bow of the vessel falling in to the pier he ordered the *Turecamo* to go astern, and while that was a proper order it was given too late for effective compliance therewith.

The pilot's negligence in handling the ship during the undocking operation was, of course, imputable to the ship *vis-a-vis* libellant. *Helen*, 1925 A. M. C. 267, 5 F. (2d) 54 (2 Cir., 1924). But cf. *Gypsum Queen—Tug Peerless*, 1953 A. M. C. 2071, 2078; *Logue Stevedoring Co. v. Dalzellance*, 1952 A. M. C. 1297, 1302, 198 F. (2d) 369, 373 (2 Cir., 1952), (dissenting opinion). We find too, that the *Turecamo tug* was at fault also and its fault contributed to the accident. Each tug, while under the general supervision of the pilot aboard the steamship, nevertheless acted independently and was obligated to so act insofar as its assigned duty or part of the maneuver was concerned. See *The Edward G. Murray*, 278 Fed. 895, 897. The *Turecamos* part of the work was to keep the bow off the pier. We find that it failed to exercise due care to avoid that contact which was plainly foreseeable and which good seamanship in performance of its task would have avoided. Cf. *Gypsum Queen—Tug Peerless*, *supra*, at 2078. Its fault created thereby independent liability *in rem* against the tug and *in personam* against its owner.

Insofar as we are concerned with the liability of the *Turecamo* tug, the steamship, and the owners of those two vessels to libellant, there is really no problem. There appeared to be a problem with respect to the cross-claims for indemnity but in view of our finding of independent fault on the part of the *Turecamo* tug, it has resolved itself.

With reference to the pilotage clause, the pilot was negligent, certainly with respect to "the handling of such vessel" and, arguably, with respect to "the giving of orders" to the tug *Turecamo*. He was also negligent in the use he made of that tug in the undocking procedure. In any event, his faults first mentioned are clearly within the purview of the pilotage clause and therefore operate to preclude indemnity in favor of the shipowner, because by virtue of that clause the pilot was the "servant" of the shipowner for the purpose of those actions. Cf. *West Eldara*, 1939 A. M. C. 877, 104 F. (2d) 670, 671 (2 Cir., 1939). If the faults of the pilot that are within the scope of the pilotage clause were the only basis for imposing liability upon the towing company that party would be entitled to indemnity from the shipowner in accordance with the terms of the towing contract. That is not the sole basis of the liability of the towing company however; at least the separate fault of the *Turecamo* tug operates to prevent the award of such indemnity.

In accordance with the foregoing the libel is dismissed as against the *Tracy* tug and its owners, and as to the remaining respondents, libellant is entitled to a decree in its favor holding them jointly and severally liable.

Settle decree with a provision for apportionment of damages equally between the ship interests and the towing company interests.

This memorandum is filed in lieu of findings of fact and conclusions of law.